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SUPREME COURT OF THE UNITED STATES

October, 1984

DUGAN & MEYERS CONSTRUCTION CO., INC. and THE GOETTLE CO., JOINT VENTURE,
Petitioner,

v.

WORTHINGTON PUMP CORPORATION (USA),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court of Appeals violated the constitutional due process rights of Petitioner by reversing the judgment of the trial court on the basis of a proffer or offer of proof by Respondent which had been rejected by the trial court, where the proffer did not involve documentary evidence but rather involved testimony which counsel for Respondent falsely contended he would elicit on cross examination from an officer of Petitioner who had never been deposed or questioned on the subject by Respondent.

B. Whether the Court of Appeals violated the constitutional due process rights of Petitioner by reversing the judgment of the trial court on the basis of Respondent's false proffer rather than remanding to the trial court for consideration of evidence offered by both parties as to the subject matter of the proffer.

C. Whether the Court of Appeals so far departed from the accepted standards of appellate review as to call for an exercise of this Court's power of supervision in accordance with Rule 17.1(a) of the Rules of this Court.

Petitioner submits that writ should be issued to answer these questions in the affirmative.

II. DESIGNATION OF CORPORATE RELATIONSHIPS

Dugan & Meyers Construction Co., Inc. and The Goettle Co., Joint Venture, Petitioner in this proceeding, states:

A. This is the Joint Venture's original designation of corporate relationships.

B. Dugan & Meyers Interests, Inc. is the parent corporation of Dugan & Meyers Construction Co., Inc.

C. Richard Goettle, Inc. is the parent coropration of The Goettle Co.

D. Dugan & Meyers Interests, Inc. does not have an ownership interest in any subsidiaries except wholly owned subsidiaries. These are the sole affiliates of Dugan & Meyers Construction Co., Inc.

E. Richard Goettle, Inc. does not have an ownership interest in any other subsidiaries and is the sole affiliate of The Goettle Co.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IV. OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, entered October 26, 1984, is printed in the Appendix, at pages 1a-23a, and has been officially published at 746 F.2d 1166 (6th Cir. 1984). The Order of the United States Court of Appeals denying Petitioner's Petition for Rehearing En Banc, entered December 10, 1984, is printed in the Appendix, at pages 51a-52a. The Findings of Fact, Opinion, and Conclusions of Law of the United States District Court for the Southern District of Ohio, Western Division, entered April 20, 1983, is printed in the Appendix, at pages 24a-28a and has not been officially reported.

V. STATEMENT OF THE GROUNDS FOR INVOCATION OF THIS COURT'S JURISDICTION

Petitioner seeks review of the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on October 2[illegible] 1984. The Order of the Court of Appeals denying the Petition for Rehearing En Banc was entered on December 10, 1984. Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

VI. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the following constitutional provisions, statutes and court rules:

A. Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Federal Rules of Civil Procedure, Rule 52 (a):

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not

necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

VII. STATEMENT OF THE CASE

A. Why This Case is Before the Court.

This case is before the Court to seek review of a violation by the United States Court of Appeals for the Sixth Circuit of Petitioner's right to procedural due process. The Court of Appeals exceeded the proper scope of appellate review by giving no deference to the findings of the District Court, reweighing almost all of the evidence, and drawing different inferences and conclusions from the evidence without the benefit of observing the credibility of the witnesses who testified at trial, thereby affording Respondent a trial *de novo* at the appellate level. Moreover, this appellate fact-finding was particularly violative of Petitioner's due process rights because the decision of the Court of Appeals was dependent upon its impermissible acceptance as evidence of a proffer or offer of proof (set forth in the Appendix at 52a-55a) submitted by counsel for Respondent which baselessly claimed that Respondent's counsel would elicit certain testimony on cross examination from an officer of Petitioner Joint Venture. This officer had not been deposed or questioned prior to trial by counsel for Respondent and has denied the substance of the proffer in an Affidavit which Petitioner submitted to the Court of Appeals on its Petition for Rehearing En Banc. (The Affidavit is set forth in the Appendix at 56a-58a.) In short,

because of what amounted to new findings of fact at the appellate level based on "new evidence" not considered by the trial court, Petitioner was denied its due process right to present evidence which would have established that the proffer was false.

B. Basis for Federal Jurisdiction.

This action was originally filed by Petitioner in state court in Ohio but was removed to the United States District Court, which exercised jurisdiction based upon diversity of citizenship under 28 U.S.C. § 1332. (App. 47a)*

C. Background Facts.

This case involves a breach of an implied warranty of fitness for particular purpose as to equipment supplied by Respondent to Petitioner. After a trial to the court, which involved approximately 2½ days of testimony and which required analysis of thousands of pages of documentary evidence, the District Court after a detailed review of the record awarded Petitioner a judgment in the amount of $424,625.90. (App. 48a)

The evidence at trial established that, early in 1974, the Metropolitan Sewer District of the City of Cincinnati, Ohio ("MSD") advertised for bids for construction of a secondary sewage treatment facility. The successful low bidder for the portion of the contract involving the general construction ("Contract 3A") was ECI Corporation, a subsidiary of Dugan & Meyers Construction Co., Inc. (one of the venturers of Petitioner Joint Venture). The mechanical portion of Contract 3A was ultimately subcontracted by ECI to Petitioner Joint Venture. (App. 3a, 6a, 25a-28a)

Petitioner Joint Venture contracted with Respondent Worthington in August of 1974 to supply a pumping system, consisting of eight pumps and motors, along with controls for the motors, under Item 21 of Contract 3A. The pumps were

* References to the findings of the courts below will be to the pages of the Appendix attached hereto.

manufactured by Worthington. The motors and controls selected by Worthington were manufactured by Continental Electric Co., Inc. and Autocon Industries, Inc., respectively. (App. 3a-4a, 8a-11a, 27a-29a)

The pumping system was to be provided in accordance with the performance specification of Item 21 as established by MSD. In other words, the system was intended to function in a specified manner, involving particular combinations of the eight pumping units. Petitioner Joint Venture at trial proved that this system of pumps, motors, and controls was defective and was unfit for the purpose set forth in the performance specification of Item 21. (App. 35a-36a, 44a-46a) No evidence was presented at trial denying that this was a performance specification.

D. The Issues on Appeal.

The first basic issue on appeal was whether the agreement of the parties included a disclaimer by Respondent Worthington of implied warranties sufficient in law to effect such a disclaimer. The District Court concluded that Respondent Worthington did not effectively disclaim the implied warranties provided by law. The District Court's decision was based upon a determination that, at the time of ECI's bid proposal, and at the time of the award to ECI of the contract, neither of the joint venturers nor the Joint Venture itself contemplated any participation by Respondent Worthington in the contract. ECI intended to engage a company called Cebor as its mechanical subcontractor for selection and installation of the pumping equipment. Cebor indicated in its bid that the pumping equipment would be supplied by Morris Pump Company, a company selected by Cebor. Only after ECI was awarded the contract as the low bidder did the joint venturers decide to form the Petitioner Joint Venture which would eliminate the need of utilizing the subcontractor, Cebor. At that time, as found by the District Court based on credited testimony, Petitioner Joint Venture began negotiations with Respondent Worthington and others for supplying

the equipment. Based on the testimony of the witnesses and the examination of the documents, the District Court concluded that the parties reached an agreement which excluded the disclaimer and the limited warranty offered by Respondent Worthington in its form proposal. This agreement was confirmed by later writings as shown by the District Court findings. (App. 26a-31a, 37a-43a)

The Court of Appeals reversed on the basis that an effective disclaimer was made, principally because of the inclusion of disclaimer language in a mimeographed form proposal sent by Respondent Worthington to all known prospective bidders at the time of MSD's advertisement for bid. In reaching this decision, the Court of Appeals remarkably relied in large part upon a "Proffer of Testimony for Larry Rayburn" (Appendix E) submitted by Respondent after the trial court ruled the line of questioning inadmissible. In the proffer, counsel for Respondent claimed, without having deposed or spoken with Larry Rayburn (President of The Goettle Co., one of the joint venturers), that Mr. Rayburn would testify that the Joint Venture was locked into accepting Worthington as supplier of the equipment and thus not only had to swallow Worthington's warranty terms but also, in order to avoid losing a lot of money, had to convince Worthington to substitute different suppliers of the motors and controls to reduce its proposal. As evidenced by the Affidavit of Larry P. Rayburn (Appendix F) submitted to the Court of Appeals on the Petition for Rehearing En Banc, Mr. Rayburn would not have testified to anything even remotely close to this fantasy evidence concocted by counsel for Respondent Worthington. Reliance upon this false proffer and upon inferences from the false proffer permeated the decision of the Court of Appeals. (App. 6a-7a, 9a, 11a, 12a-13a)

The second basic issue on appeal was whether Petitioner Joint Venture proved that Respondent Worthington had committed a breach of warranty. The District Court concluded that such a breach of warranty had been proven. The District Court's decision was based in part upon the testimony of Lawrence Papes, the design engineer responsible for the

development of the specifications for this sewage treatment plant, who testified that Item 21 of the contract was a performance specification and that Petitioner Joint Venture had to rely upon the expertise of Respondent Worthington to select the proper equipment to meet the level of performance required by the specifications. Other witnesses for Petitioner Joint Venture also testified to this reliance. (App. 31a-36a, 44a-46a)

The Court of Appeals concluded, however, that the suppliers of the equipment which failed were used by Respondent Worthington at Petitioner's request and that thus there was no reliance on Worthington's expertise in selecting the equipment. (App. 9a, 10a-11a, 16a-17a) There is no evidence in the record to support this conclusion. The only basis for the conclusion was the false proffer.

VIII. ARGUMENT

A. The Court of Appeals Improperly Relied upon the False Proffer and Impermissibly Retried the Facts of this Case.

Even a cursory review of the decision of the Court of Appeals demonstrates that the decision pays mere lip service to the "clearly erroneous" standard of review. The decision, as shown by the following analysis of key factual findings, showed no deference whatsoever to the trial court's findings of fact and amounted to an impermissible reweighing of the evidence without the opportunity to evaluate witness credibility and demeanor.

A brief history is necessary to understand the District Court's factual findings as to what constituted the terms of the contract between the parties. On May 15 and May 17, 1974, Respondent Worthington submitted mimeographed proposals for the Item 21 work to all companies which had obtained bid documents from MSD, including each of the joint venturers. The May 15, 1974 proposals contained a disclaimer of implied warranties. ECI, a subsidiary of one of

the joint venturers, was the successful bidder. In its bid, ECI had listed Morris Pump as the supplier of the Item 21 equipment since Morris Pump had been listed by Cebor, a company which ECI intended to use to perform the mechanical work, including Item 21. After the successful bid, Petitioner Joint Venture was formed to perform the mechanical work on the basis of a business decision that the Joint Venture could do the work as well as and cheaper than Cebor. In August of 1974, according to testimony credited by the District Court, Petitioner Joint Venture for the first time negotiated with Respondent Worthington and other companies such as Allis Chalmers concerning supplying the Item 21 equipment. (App. 26a-28a) Thereafter, the following documents were exchanged by the parties (App. 28a-31a):

1. On *August 26, 1974,* Worthington sent a letter proposal to the Joint Venture. No disclaimer was contained in this document.

2. On *August 28, 1974,* the Joint Venture gave a verbal purchase order to Worthington and prepared a written purchase order.

3. On *September 29, 1974,* the design engineer approved the substitution of Worthington for Morris.

4. On *October 8, 1974,* the Joint Venture transmitted a written purchase order dated August 28, 1974.

5. On *October 14, 1974,* the Joint Venture received an acknowledgement form dated October 2, 1974 from Worthington. This document contained a disclaimer.

With this background, the contradictory factual findings of the District Court and the Court of Appeals can be reviewed.

1. *The District Court,* based upon testimony as well as documentary evidence, found that ECI was awarded the general construction contract by MSD pursuant to a bid which listed Morris Pump rather than Respondent Worthington as supplier of the Item 21 system. (App. 25a, 27a-28a) *The Court of Appeals* made a contrary finding, stating: "As will be seen from the review of the testimony, this offer by

Worthington [in August of 1974] was prompted by the fact that the information provided by E.C.I. on the Morris Pumps was insufficient for [MSD] to make a determination that their pumps were acceptable under the specifications." (App. 6a-7a) No such testimony was in fact later reviewed in the Court of Appeals opinion and no evidence in the record supports this contrary finding other than the proffer of fictitious testimony.

2. *The District Court*, based upon testimony as well as documentary evidence, found that Petitioner Joint Venture first negotiated with Worthington and other suppliers in August of 1974 and that, following these negotiations, the Joint Venture was required to obtain the approval of MSD to substitute Worthington for Morris. (App. 27a-29a) *The Court of Appeals* found otherwise, stating that Petitioner Joint Venture was forced to switch to equipment supplied by Worthington after Petitioner found at the last minute that the Morris equipment was not acceptable to MSD. (App. 6a-7a, 9a, 11a) The record once again is devoid of any support whatsoever for the finding of the Court of Appeals except the proffer of fictitious testimony.

3. *The District Court*, based upon the unrebutted and credited testimony of Lawrence Papes, the design engineer who oversaw preparation of all the specifications for the wastewater treatment plant, and of Frederick Slack, the project manager for Petitioner Joint Venture, found that the Item 21 specifications were performance specifications and that Petitioner Joint Venture relied upon the skill and expertise of Respondent Worthington to select equipment which would perform to the level required by the specifications. The specifications defined what the equipment was to be capable of doing; they did not define specific equipment. (App. 35a, 46a, 47a) *The Court of Appeals* ignored the testimony of Papes (who was mistakenly identified by the Court of Appeals as an employee of MSD) and Slack in finding that Petitioner Joint Venture did not rely on the expertise of Respondent Worthington to select the equipment. The Court of Appeals reversed the trial court finding of reliance on the sole basis

that Worthington's initial proposals in May of 1974 listed Westinghouse motors and controls, but Worthington ultimately supplied Continental Electric motors and Autocon controls, supposedly at the request of the Joint Venture. (App. 6a-7a, 9a, 11a, 16a-17a) There is no support whatsoever in the record for this finding. As support, the Court of Appeals could only cite the false proffer and its own tortured interpretation of the testimony of Carroll Robertson, Worthington's representative. The Court of Appeals stated:

> Robertson's testimony *corroborated the proffer* on Rayburn that the change to Continental motors and Autocron [sic] controls was made at plaintiffs' request in an effort to reduce Worthington's price. (App. 10a-11a) (Emphasis added)
>
> When plaintiff's [sic] switched, they asked Worthington to change to Continental motors and Autocron [sic] controls in an effort to reduce the overall price. (App. 11a)
>
> Here, the trial court's finding that plaintiffs relied on Worthington's superior expertise cannot be sustained since regardless of whether or not Worthington possessed greater expertise than plaintiffs, Worthington did not choose all of the equipment covered by the subcontract. (App. 17a)

Apart from the false proffer, the only support cited for the above statements was the following testimony of Robertson (which to the contrary corroborates Mr. Rayburn's Affidavit rather than the false proffer):

> Based on this report, we were still trying to work with them to see *what we could do to get our equipment down to a competitive level,* so that if they had to supply — if they were called upon to supply Worthington pumps or DeLaval, that they'd pick Worthington. To this end, *it was suggested to me by ECI, Dugan & Meyers that I contact Continental Electric, and consider using Autocon panels,* because some of the other bidders of the pumps and equipment had used these motors and panels.

> At that time, I contacted Continental Electric, I believe it was Bernie Knittle who gave me a price, and eventually, I got a handwritten proposal on the motors for this equipment, and I got pricing on the remaining panels and control equipment from H. P. Thompson, and basically, it ended in about a ninety thousand dollar drop in price in our bid. (Emphasis added.)

The above testimony was the sole evidentiary basis for the Court of Appeals' finding that the Joint Venture did not rely on Worthington's skill and expertise in selecting the equipment, notwithstanding the explicit testimony of Papes and Slack credited by the District Court. The Court of Appeals ignored the fact that, even if a particular supplier had been designated, Respondent Worthington still had to determine the design, capacity, etc. of the system components in order to meet the performance specifications. Worthington's representative Robertson admitted that the pumps were not "stock" items but required "particular engineering to meet particular specifications."

4. *The District Court* found based on uncontroverted evidence that ECI was awarded the contract by MSD on the basis of a bid proposing Morris equipment, and that approval of MSD was required to substitute Respondent's equipment for that of Morris. (App. 25a, 27a, 29a, 38a) *The Court of Appeals* reversed this finding by stating: "The evidence seems clear, however, that the award of the contract to the joint venture could not have been made without consideration and approval by [MSD] of Worthington's letter proposals of May 15, 1974 and May 17, 1974, since the forms of proposal required a detailed submission of certain data which was outlined in these letters." (App. 14a) The record is utterly devoid of any evidence ("seemingly clear" or otherwise) other than the false proffer that the award of the contract was conditioned on approval by MSD of the equipment proposal submitted by Respondent.

5. *The District Court* found that the first and only negotiations between Petitioner Joint Venture and Respondent Worthington occurred during August of 1974, at which

time the parties' representatives entered into verbal discussions and exchanged documents. The District Court weighed the testimony of the witnesses as to the August negotiations, including the testimony of Petitioner's witnesses as to insisting that Worthington be bound by the same warranty as the Joint Venture had extended to MSD, reviewed the various documents exchanged by the parties, found that there was no one document signed by both parties expressing the contract or the warranty terms, determined that the various documents had contradictory terms regarding warranty in the "battle of the paper," and found that the contract of the parties did not include the limited warranty and disclaimer of implied warranties language contained in the mimeographed proposal sent by Respondent to all bidders in May of 1974. Based in large part upon testimony, the District Court found "that the parties simply failed to agree on this question [of warranties] and hoped it would not become a problem in the future." Based upon this finding as to the parties' intent, the District Court turned to the implied warranties provided by law. (App. 25a-31a, 38a-43a) *The Court of Appeals* decided that this finding was "clearly erroneous" without discussing the many elements, including the testimony, which led to the District Court's finding in this regard.

6. *The District Court* found that the May, 1974 mimeographed proposals of Respondent Worthington lapsed after 30 days by their own terms, so that, unless specifically made a part of the negotiations in August of 1974, these May proposals could not be considered part of the parties' contract. (App. 27a, 39a) *The Court of Appeals* rejected this finding without even addressing the 30 day lapse provision. (App. 14a-15a).

7. *The District Court* found that the terms of the May, 1974 proposals were not incorporated into the August 26, 1974 letter proposal by mere reference to an internal proposal number used by Respondent Worthington. (App. 28a, 39a) *The Court of Appeals* rejected this finding based upon a determination that the May proposals were a necessary part of the contract between the parties because the equipment in-

formation attached to the May proposals was necessary to be submitted to MSD in order for ECI's bid to be accepted. (App. 14a-15a) Once again, this concept of ECI's bid being in danger is based solely upon the false proffer. Further, the decision of the Court of Appeals failed to recognize that the equipment information from the May proposals could be used by the Joint Venture without necessarily incorporating into the parties' contract the proposal language concerning warranty. The distinction between contract terms (which are fully set forth in the August 26 letter which contains no reference to limitation of warranties) and equipment information apparently escaped the Court of Appeals. The Court of Appeals ignored the fact that other terms of the May proposals, such as terms of payment, were not the terms of the parties' ultimate agreement.

8. *The District Court* found, based on undisputed evidence and testimony, that ECI intended to subcontract the mechanical work to Cebor if awarded the contract and that Petitioner Joint Venture was not formed until the summer of 1974, after which the Joint Venture negotiated with Worthington for the first time. (App. 27a-28a) *The Court of Appeals* did not even mention Cebor nor the testimony as to the beginning of negotiations in August, and yet reached the conclusion that "the suggestion that somehow the joint venture was a new party on the scene was clearly incorrect." (App. 13a)

9. *The District Court* found, based on undisputed evidence, that the last date of shipment of equipment (specifically, the motors) by Respondent Worthington under the contract was in *December of 1976*. Thus the eighteen month warranty claimed by Worthington to apply would terminate in June of 1978. The District Court also made the uncontroverted finding that the first significant problem with the system involved excessive vibration of pump number 8, reported to Worthington and observed by its representative in *September of 1977*. The District Court later found based on undisputed evidence that the failures of other motors were of the same nature. (App. 31a-35a) Thus, although the

District Court did not need to reach the issue, Worthington had timely notice of breach even under the express warranty claimed to apply. Remarkably, and without any basis in the evidence, *the Court of Appeals* falsely found that the "last of the motors was shipped on *September 30, 1976*" and that the "first trouble with the mixed liquor pumping system began with pumps 6 and 8 in *June 1978.*" (App. 16a) (Emphasis added) Based on this incorrect version of the facts, the Court of Appeals apparently determined that Worthington had no notice of breach during the eighteen month express warranty period, which it calculated as terminating on March 31, 1978. (App. 8a)

10. *The District Court* found that the system of pumps, motors, and controls provided by Worthington was defective since it failed to meet the performance specifications. (App. 44a-46a, 47a-48a) *The Court of Appeals* found that no breach of warranty had been proven since, although the Item 21 system failed, Respondent Worthington did not provide all the items under Item 21. (App. 17a-18a) This finding, however, ignored the facts established at trial that the only parts of Item 21 which failed were the motors and controls supplied by Worthington. No other items under Item 21 were claimed to have failed. Besides, the evidence was undisputed that Worthington had responsibility for supervising the installation of the pumps, motors, and controls and for assuring their proper operation upon installation. The further conjecture of the Court of Appeals that the system might have failed "as a result of the way the system [was] operated" (App. 16a) ignored the undisputed evidence that the system was operated properly and the testimony of Papes, who designed this system and many similar ones, that the system would work if the proper equipment was selected to meet the performance specifications.

Remarkably, in reversing the key findings of the trial court as to contract formation and reliance on Worthington's skill, the opinion of the Court of Appeals started by simply citing the proffer, but ended by elevating the proffer to the level of undisputed evidence.

The Court of Appeals' unjustified acceptance of the proffer

as true also resulted in the drawing of different inferences from those drawn by the District Court. Acceptance of the proffer as true caused the Court of Appeals to view the relationship of the parties and the contract negotiations in a way totally different from the District Court. This led the Court of Appeals to draw erroneous inferences regarding the relationship of Worthington's form proposal to the August negotiations, and slanted the Court of Appeals' assessment of the contract formation issues. The proffer, if accepted as true, creates an impression that the Joint Venture was in desperate circumstances; that it was in danger of either losing its $22 million contract or incurring an additional $100,000 expense; that it was forced to use Worthington's equipment; and that Worthington came along as a "white knight" to save the Joint Venture from this disaster, including agreeing to replace the Westinghouse motors and controls with Continental motors and Autocon controls. Only with these inferences could the Court of Appeals conclude that there was the requisite basis for reversing the District Court's judgment. The findings and inferences of the District Court should not have been disturbed on appeal.

All three parts of the Court of Appeals decision were tainted by the proffer. Without the proffer, the Court of Appeals could not have found that Worthington was in a position to demand that its disclaimer and limited warranty in its form proposal be accepted. Without the proffer, the Court of Appeals could not have found that the August negotiations were dependent upon the May proposals, as compared to the testimony credited by the trial court that the Joint Venture first began negotiations with Worthington in August and was bargaining both with Worthington and with others at arms length, not desperately as claimed by the proffer. Without the proffer, the Court of Appeals could not have found that the Joint Venture did not rely on the expertise of Worthington in selecting the motors and controls. Without the proffer, the Court of Appeals could not have found that Item 21 was not a performance specification and thus could not have found that the Joint Venture failed to prove defect of the equipment. The Joint Venture proved the equipment was defective in

that it failed to meet the performance specifications since the equipment never performed to specification.

B. The Court of Appeals Violated the Constitutional Due Process Rights of Petitioner by Reversing the Decision of the Trial Court Based Upon the False Proffer of Respondent and by Not Remanding to the Trial Court.

As demonstrated by the foregoing, the unquestioning reliance by the Court of Appeals on the false proffer of fantasy testimony submitted by Respondent deprived Petitioner Joint Venture of due process of law under the Fifth Amendment to the United States Constitution.

This Court has held: "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. *That includes the right to introduce evidence and have judicial findings based upon it.*" *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U.S. 349, 368-69 (1936) (Emphasis added). This fundamental right was denied to Petitioner since Petitioner was not given the opportunity to present evidence concerning the subject matter of the false proffer. The blind acceptance of the false proffer by the Court of Appeals and the consequent reliance on the proffer to reverse the District Court decision deprived Petitioner of a trial on the merits of its claims.

Petitioner was even forced to resort to the unusual course of submitting an Affidavit to the Court of Appeals on the Petition for Rehearing in order to demonstrate that the fantasy "evidence" submitted in the proffer by Respondent was not only presumptuous (since the testimony was purported to be obtainable on cross examination of Petitioner's officer who had neither been deposed nor questioned previously by Respondent on the subject matter of the proffer) but also blatantly false.

Since the District Court had properly ruled that the subject matter of the proffer was inadmissible (for the reason that ECI was *in fact* awarded the contract by MSD and any flaws in the bid of ECI were not relevant to a determination of the

contract between Petitioner and Respondent), Petitioner had no reason to rebut the rejected fantasy evidence. Thus no evidence was ever taken at the trial level on the subject matter of the proffer.

If the Court of Appeals felt that the District Court's decision to exclude the evidence which was the subject of the proffer was in error, the only proper course was to remand the question to the District Court to allow the subject matter of the proffer to be litigated at the trial level. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982); *Foster* v. *Dravo Corp.*, 420 U.S. 92, 102 (1975).

In short, the failure of the Court of Appeals to allow Petitioner through its representative Mr. Rayburn to be heard and to present evidence on the subject of the proffer violated the Fifth Amendment. Since the Court of Appeals' reversal of the trial court judgment was utterly dependent upon the proffer and since the proffer cannot be substantiated, this Court should reinstate the judgment of the District Court or at least remand to the District Court to allow the actual, rather than speculative, testimony of Mr. Rayburn on the subject matter of the proffer.

C. The Court of Appeals So Far Departed From the Accepted Standards of Appellate Review as to Call for This Court's Power of Supervision.

As shown by the foregoing analysis of the decisions of the District Court and of the Court of Appeals, the majority opinion of the Court of Appeals, written by a trial court judge sitting by designation, far exceeded the ordinary scope of appellate review by retrying all the facts, reweighing all the evidence, and giving no deference whatsoever to the factual findings of the District Court.

In *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982), this Court recently reiterated and amplified upon the long accepted standards of appellate review set forth in the historic case of *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). In construing the limitations under Federal Rules of Civil Procedure, Rule

52(a) (the "clearly erroneous" standard), Justice O'Connor, writing for the majority, stated:

> That Rule [Rule 52(a)] recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. . . .
>
> . . . By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. . . .
>
> . . . An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."
>
> *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, *supra* at 855-58 (citations omitted).

The many factual errors committed by the Court of Appeals in the process of the wholesale reweighing of the complicated facts of the present case demonstrate one of the many reasons why this Court should exercise its power of supervision under Rule 17.1(a) to assure that the mandates of Rule 52(a) and of the interpretive decisions of this Court under that Rule are adhered to by the Courts of Appeals. A further reason for these strict limits is to encourage finality of judgments in factually complex cases, thus avoiding appeals based on the hope that the appellate court will second-guess the trial court. There is no real purpose for fact findings under Rule 52 if the appellate court holds a trial *de novo*.

As the United States Court of Appeals for the Eighth Circuit stated well in *Pendergrass* v. *New York Life Ins. Co.*, 181 F.2d 136, 138 (8th Cir. 1950):

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that

> of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.

The Court of Appeals, in misapplying the "clearly erroneous" standard of Rule 52(a), "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" pursuant to Rule 17.1(a) of the Rules of this Court. The minimization of the responsibilities of the trial judge by denying a large degree of finality to findings of fact has been deplored by commentators and courts alike. *See*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). In *Jacuzzi Bros., Inc.* v. *Berkeley Pump Co.*, 191 F.2d 632, 634 (9th Cir. 1951), the court stated:

> The trial courts find the facts. If appellate courts exercise no self-restraint, then, after the primary facts are thus found, these same facts are found anew twice over, with varying results. . . . Not only finality, but stability is lost. All is confusion.

IX. CONCLUSION

The due process rights of Petitioner and the expectation that trial court fact findings will not be retried and reweighed by the appellate court deserve and require the protection of this Court. For these reasons and the reasons set forth above, Petitoner submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Joint Venture

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3525.

DUGAN & MEYERS CONSTRUCTION CO., INC.
and THE GOETTLE CO.,
Plaintiffs-Appellees,

v.

WORTHINGTON PUMP CORPORATION (USA),
Defendant-Appellant.

Argued May 11, 1984.
Decided Oct. 26, 1984.

William R. Hardy (argued), Graydon, Head & Ritchey, Cincinnati, Ohio, for defendant-appellant.

James W. Halloran (argued), David L. Barth, Cincinnati, Ohio, for plaintiff-appellees.

Before CONTIE and WELLFORD, Circuit Judges, and COHN, District Judge.*

COHN, Distict Judge.

I.

This is a breach of contract case. On April 20, 1983 the district court, following a bench trial, entered a judgment

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

against defendant Worthington Pump Corporation (USA) (Worthington) for $424,625.24 in favor of plaintiffs Dugan and Meyers Construction Co., Inc. (Dugan & Meyers) and The Goettle Co., (Goettle), for the damages it found they suffered because of the failure of the mixed liquor pumping system at the Little Miami Waste Water Treatment Plant (the Plant) operated by the Metropolitan Sewer District of Greater Cincinnati (the District).

E.C.I. Company (E.C.I.), a wholly owned subsidiary of Dugan & Meyers, was the prime contractor for general construction work in improvements at the Plant which included the mixed liquor pumping system. The work was actually performed by Dugan & Meyers and Goettle as a joint venture. Worthington was a subcontractor for the pumps, motors and control panels of the mixed liquor pumping system.

The district court found that Worthington breached an implied warranty of merchantability and fitness for a particular purpose in the work that it did. Ohio Rev. Code § 1302.27 (U.C.C. § 2-314) and § 1302.28 (U.C.C. § 2-315). Worthington appeals.

We find that the district court erred in concluding that Worthington's limited warranty terms were not part of its subcontract and also erred in concluding that Worthington breached an implied warranty. The subcontract documents expressly limited Worthington's warranty to eighteen months following delivery of the particular equipment it furnished. Additionally, Worthington did not subcontract to deliver the complete mixed liquor pumping system. There was no evidence that the particular equipment delivered by Worthington did not meet specifications or that there was any defect in the equipment at the time it was delivered.

II.

Our conclusion that the district court erred in holding that Worthington's warranty terms were not part of its subcontract requires us to review the trial record in some detail. We will do this by first reviewing the documents which reflect the

subcontract[1] and then the testimony regarding these documents. This review is also relevant to our conclusion that the district court erred in holding that Worthington breached an implied warranty because, as shall be seen *infra*, the district court defined the scope of the work performed by Worthington in considerably broader terms than is reflected in the documents.

Fed.R.Civ.P. 52(a) provides that findings of fact by the district court shall not be set aside unless they are clearly erroneous. See *Alexander* v. *Youngstown Board of Education*, 675 F.2d 787, 795-796 (6th Cir. 1982). In our rejection of the fact findings of the district court we have followed that standard. As to the interpretation and construction of the subcontract, the clearly erroneous rule does not apply. See e.g., *Industrial Equipment Co.* v. *Emerson Elec. Co.*, 554 F.2d 276, 284 (6th Cir. 1977) ("The decision on the existence of a contract and the decision on the construction of a contract are both ultimate questions of law."); *Taylor & Gaskin, Inc.* v. *Chris-Craft Industries*, 732 F.2d 1273, 1277 (conclusion of law are subject to *de novo* review); *Cordovan Associates* v. *Dayton Rubber Co.*, 290 F.2d 858, 860 (6th Cir. 1961).

A.

Early in 1974 the District invited bids for improvements to the Plant in the form of a proposal and form of contract. Contract 3A covered general construction and contained forty-four separate items of work. Item 21—Mixed Liquor Pumping Equipment—covered the particular system, including equipment, necessary to pump effluents from aeration

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[1] The contract with the District was signed by E.C.I. The documents exchanged between the parties which constitute the subcontract were usually addressed by Worthington to E.C.I. or Dugan & Meyers while the documents addressed to Worthington were on Dugan & Meyers' stationary or forms. The district court distinguished the joint venture from either E.C.I. or Dugan & Meyers or Goettle as a contracting party. Because of the varied manner in which the documents were addressed and signed, we find such distinction unwarranted. See also the discussion at p. 1174 *infra*.

tanks to final settling tanks. This item had twenty-one detailed parts or specifications. The form of proposal described the work for Item 21 as follows:

> The Contractor shall furnish and install at the locations shown on the drawings or as required, a complete mixed liquor pumping installation consisting of eight (8) horizontal, centrifugal, mixed flow type pumps, driven by variable speed, wound rotor motors. Drivers and pumps shall be direct connected through flexible couplings and mounted on a common bedplate. Included also is the complete control installation. Two complete systems will be furnished, one for each bank (east and west) of pumps, each bank consisting of four (4) pumps. The above is a general description of the equipment required, however, the intent of this specification is to require an installation complete in every detail. Consequently, the Contractor will be responsible for all accessories, appurtenances and any special construction which may be necessary to properly complete the work of this Item. The price bid under this item shall include the cost of all materials and labor required.

More specifically Item 21 included, in addition to the pumps, motors and control installation, work under other items such as concrete foundations, motor starter equipment, flow meters, piping and an overall electrical link up.

The form of proposal generally required each bidder to schedule the name of the manufacturer of the equipment proposed to be furnished together with certain additional essential information regarding such equipment. These "major equipment offerings", as they were called, provided that if the manufacturer or supplier was not one of those named in the specifications the bidder was required to furnish additional data. As to Item 21, the bidder was also required to list as a second manufacturer one of the manufacturers named in the specifications "together with the total lump sum amount . . . to be added to or deducted . . . from the [bid] if the District select[ed] the equipment of that manufacturer". Worthington was one of the manufacturers of pumps named

in the specifications. As is customary, several manufacturers of pump equipment made proposals to likely bidders offering their equipment for inclusion in the bids. Worthington was one of the pump manufacturers making such a proposal.

On May 15, 1974, Worthington addressed a form letter to Dugan & Meyers offering to provide equipment for certain specific parts of Item 21. Presumably, Goettle received the same letter. On May 17, 1974, Worthington addressed form letters to Goettle and Dugan & Meyers following up the letter of May 15, 1974. The May 15, 1974 letter referred to "our quote CLV-129-74E-FL" and described the specific parts of Item 21 Worthington offered to provide[2] as well as parts of Item 29, the service water pumps, which Worthington was willing to provide. Neither letter contained a price. The first letter had attached the Worthington Standard Conditions of Sale which included terms of payment, 10% with purchase order, 80% over the time of manufacturer and 10% upon completion of erection and testing, and a warranty "for a period of one year from the date of shipment . . . against defects in material and workmanship, under normal use and service . . ." as well as the following statement:

> "This is Worthington's sole and exclusive warranty [and] applies only to equipment manufactured by Worthington."

The May 17 letter included detailed information on the pumps being offered, terms of payment of 90% on delivery and 10% on acceptance, not to exceed 180 days from shipment, and extended the warranty "to include one year from acceptance not to exceed 18 months from shipment".

Worthington's proposal in its letter of May 15, 1974 did not include all of the parts or specifications described in Item 21;

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[2] Worthington limited itself to furnishing Shop Testing (21.06), Mixed Liquor Pumps (21.08), Conditions of Service (21.09), Pump Construction (21.10), Motors (21.11), Panel Automatic Control System (21.12), Motor Control Centers (21.13), Local Control Panels (21.14), Spare Parts (21.19), Safety Guards (21.21) and Additional Services (21.22). The additional services consisted of adjusting and testing the equipment after installation.

Worthington did not propose to install the complete mixed liquor pumping system. Specifically, Worthington did not obligate itself to furnish Detailed Drawings (21.02), Work Under Other Items (21.07),[3] Electrical Installation (21.15), Anchor Bolts And Installation (21.16), Piping And Valves (21.17) and Painting (21.10). The Worthington warranty was substantially the same warranty as contained in the proposals of other pump manufacturers.[4]

E.C.I. was the successful bidder on Contract 3A. On August 28, 1974 it signed a contract with the District and posted a twenty-two million dollar performance bond. The bid which was incorporated into the contract with the District listed Morris Pumps, Inc. as the pump manufacturer under Item 21 and did not list a manufacturer named in the specifications as an alternate manufacturer.

Two days earlier, on August 26, 1974, Worthington wrote "E.C.I.

Duggan & Meyers/Richard Goettle, Inc." a letter which stated that the writer was confirming the data he gave "Larry Rayburn verbally on August 23, 1974" as to the lump sum price of $570,250 for the equipment it offered under Item 21 and Item 29. The letter made specific reference to "our Proposal CLV129-74E-PL" and to the particular parts of Items 21 and 29 described in the May 15, 1974 letter. A "December 1975 delivery" was based upon receipt of a verbal purchase order by August 28, 1974. This letter also included as an attachment a bid to Worthington for the control panel (Autocon) and stated the lump sum price was based on using "Continental Electric Motors".

As will be seen from the review of the testimony, this offer by Worthington was prompted by the fact that the information provided by E.C.I. on the Morris Pumps was insufficient for the District to make a determination that their pumps

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[3] "[T]he 5KV full voltage motor starter equipment and all connecting wiring between the motor control center and the manual control panel".

[4] These included Allis-Chalmers Corporation, DeLaval Turbine, Inc. and Morris Pumps, Inc.

were acceptable under the specifications. The testimony also established that Worthington was given a verbal go-ahead on August 28, 1974.

On September 3, 1974 the District was asked to approve the substitution of the Worthington pumps for the Morris pumps. Also, on September 3, 1974 Engineering Construction, Inc. wrote Worthington that it requested the District to approve the change to Worthington pumps and that "upon approval of this change . . . we will purchase this equipment from Worthington pump in accordance with your latest quotation dated August 26, 1974".[5] On September 4, 1974 the District sent E.C.I. a copy of the executed contract and a Notice to Proceed. On September 27, 1974 the consulting engineers to the District approved the change from the Morris pumps to the Worthington pumps for Item 21.

On October 2, 1974 Worthington sent
"E.C.I.
Duggan & Meyers"
a printed form of acceptance for eight mixed liquor pumps complete with motors and controls for a price of $527,457. It was not received until October 14, 1974. The form stated the terms of payment as 90% upon delivery and 10% upon acceptance not to exceed 180 days from shipment and included 10 days of Worthington service. Under the heading "our quotation No." it referenced "CLV-129-74" and under "Date" on the same line it referenced "5/17-5/21 & 8/26/74". Following the words "Cust. Order No." on the front were the words "Letter Intent". The printed backside of the form contained Worthington's limited warranty as previously described.

On October 8, 1974 Dugan & Meyers sent Worthington a purchase order on a Dugan & Meyers' order form for "Pumps for Item 21 & 29, as per your quote and Plans & Specifications" for a lot price of $570,250. The purchase order form

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[5] Engineering Construction, Inc. is not identified in the record. From the letterhead it appears to be a wholly owned subsidiary of Dugan & Meyers.

was dated August 28, 1974.[6] On November 8, 1974 Dugan & Meyers wrote Worthington confirming a telephone conversation in which its purchase order was amended to delete the pumps under Item 29, changing the total purchase price to $527,457 and adding to the terms of payment "no retainage". Worthington acknowledged the alimination of the retainage. The previous references to Item 29 are in Worthington's letters of May 15, 1974 and August 26, 1974. There is no reference to Item 21 in Worthington's acceptance of October 2, 1974. The previous references to retainage are in Worthington's letters of May 15, 1974 and May 17, 1974 and particularly in its acknowledgment of October 2, 1974. Terms of payment are not mentioned in Worthington's letter of August 26, 1974 or in the Dugan & Meyers' purchase order. Lastly, the change in the total purchase price to $527,457 with the elimination of the Item 29 pumps, is consistent with the price stated in Worthington's acknowledgment of October 2, 1974. The Dugan & Meyers' purchase order did not separately state a price for Item 21 and Item 29.

The motors were separately delivered, after the pumps were shipped, on various dates between July 16, 1976 and September 30, 1976 so that the eighteen month period of Worthington's limited warranty expired on March 31, 1978.

B.

The testimony describing discussions on the subcontract was rather meager, confirming the district court's view that "the parties did not intend to reach a binding oral agreement as to the terms of the contract". Lawrence Rayburn (Ray-

[6] The backdating of the purchase order to conform to the date of the oral purchase order is of some moment because the district judge in large part premised his finding that the parties never agreed to Worthington's limited warranty on the fact that the purchase order was actually prepared on August 28, 1974 and was "appropriately [to be] considered an offer to purchase the mixed liquor pumps and related equipment required under Item 21 of Contract 3A." In our view the parties were already obligated to each other by the time the purchase order was sent and therefore it plays no role in determining whether the limited warranty was part of the Worthington subcontract.

burn) a vice-president of Goettle testified that the warranty was critical to the plaintiffs but that he had no recollection of ever discussing it with Worthington. He testified that the verbal purchase order was given to Worthington on August 28, 1974. In a proffer regarding Rayburn's testimony, Worthington said he would also testify that Worthington's initial proposal included Westinghouse motors and controls at an overall price of $659,833, that plaintiffs requested Worthington to substitute Continental motors and Autocron controls at a reduced price when the Morris pumps were determined to be unacceptable, that Worthington did reduce the price by some $89,000 and that this reduction enabled plaintiffs to obtain the contract with the District.

George Cramer (Cramer), the first project manager for Dugan & Meyers, testified that he coordinated and obtained the bids of the subcontractors for the mechanical work, that Rayburn worked with him, that "we received a revised proposal from Worthington's pump" sometime in August and that he sent the letter of September 3, 1974 from Engineering Construction, Inc. to Worthington. He recalled at least one meeting with Worthington and described the discussions at the meeting regarding the warranty as follows:

Q. What was the nature of your discussions with those representatives of Worthington?

A. . . . they were quite interested in selling the pumps to the joint venture and we were trying to iron out any problems with their proposal versus what was needed to fulfill the contractual obligations to the city.

Q. Were there any particular concerns with respect to their proposal which were discussed?

A. The warranty of the —period of time of the warranty.

Q. Do you recall what was discussed with respect to the period of time of the warranty?

A. That, really, their warranty did not meet the plans and specifications which called for—which called for them to provide certain guarantees and warranties per the plans and specifications, and we wanted

> to make sure that their warranties would meet those that we had to give to the city.

Cramer testified as to receipt of Worthington's letter of August 26, 1974, but did not mention the verbal purchase order of August 28, 1974. Lastly, Cramer acknowledged that the letter of August 26, 1974 made no mention of warranty one way or the other.

Frederick Slack (Slack), the Dugan & Meyer's project manager who followed Cramer, testified that he went to work in September 1974, that he prepared the purchase order dated August 28, 1974 which he sent on October 4, 1974 and that the acknowledgment by Worthington was received by Dugan & Meyers on October 14, 1974. Slack also testified as to his unsuccessful effort to obtain a signature from Worthington acknowledging receipt of the purchase order.[7]

Carroll Robertson (Robertson), who handled the subcontract for Worthington, testified that he had no recollection of any discussion regarding warranties and also that he did not recall Rayburn insisting that the Worthington warranty be co-extensive with the warranty in the prime contract running to the District. He further testified that when Worthington wrote prospective bidders on May 15, 1974 it had not decided who would supply the motors and control panels and that on the morning of the bid openings Worthington gave its final price to the bidders and advised them Worthington was going to use Westinghouse motors and controls. Robertson's testimony corroborated the proffer on Rayburn that the change to

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[7] The effort to obtain a formal acknowledgment from Worthington is reflected in two documents. The first is a letter by Slack to Worthington and the second is Worthington's response on March 4, 1975 saying that it was not Worthington's custom to sign a customer purchase order and that Worthington confines its acceptances only to the terms and conditions of its Standard Acknowledgment Form. The district judge found this exchange of correspondence of some significance in arriving at his conclusion. Like our disregard of the Dugan & Meyers' purchase order we find this correspondence not relevant to a determination of the agreement of the parties. See footnote 6, *supra*.

Continental motors and Autocron controls was made at plaintiffs' request in an effort to reduce Worthington's price.

Lawrence Papes (Papes), an employee of the District who drafted Item 21 for the design engineers, testified that Item 21 described the level of performance that had to be met by the system installed with the actual selection of particular equipment left to the contractor.

C.

1.

The district court filed detailed findings of fact and conclusions of law as required by Fed.R.Civ.P. 52. We have reviewed the findings and conclusions in light of the record as a whole. A finding is "clearly erroneous" when, although there is evidence to support it, a reviewing court is left with the definite and firm conviction that mistake has been made. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), *rehearing denied* 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147; *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, 80 S.Ct. 1190, 1199, 4 L.Ed.2d 1218 (1960). Based on the entire record, we are left with the firm conviction that a mistake has been made in this case in the conclusion that Worthington's limited warranty terms were not part of its subcontract.

2.

The district court found that the joint venture reviewed various equipment proposals including Worthington's and, after negotiating with various pump manufacturers, elected to purchase the pump equipment from Worthington. This of course is not true. Plaintiffs initially chose to use the Morris pumps and only at the last minute when they found out Morris' pumps were not acceptable to the District did they switch to Worthington. When plaintiffs switched, they asked Worthington to change to Continental motors and Autocron controls in an effort to reduce the overall price.

The district court found that Cramer, in his discussion with Robertson, advised Robertson that "plaintiff would require

all equipment suppliers to be bound by the warranty to the City contained in Contract 3A." The evidence does not support this characterization of Cramer's testimony.[8] At most Cramer indicated a desire to have Worthington's warranty meet the warranty to the District in the prime contract; there is no evidence that he ever followed through. We note that Cramer left the project in September before the District approved the changeover to Worthington pumps.

The district court found that the Dugan & Meyers' purchase order which was sent on October 8, 1974, was prepared on August 28, 1974. Again, the evidence does not support this finding. The purchase order was prepared by Slack who did not start working on the project until September. Even if it were proved the purchase order had been prepared on August 28, 1974, that fact would be of no relevance since it was not sent to Worthington until October 8, 1974.

The district court found that the purchase order, dated August 28, 1974, was appropriately to be considered an offer to purchase. By October 8, 1974, however, the date the purchase order was sent, E.C.I. had signed the prime contract with the District and had been given a Notice to Proceed. By September 30, 1974, moreover, Dugan & Meyers had orally accepted Worthington's revised proposal, acknowledged its acceptance in writing and received formal approval from the District of the change from Morris to Worthington pumps. Also, on October 2, 1974 Worthington had formally acknowledged receipt of a purchase order from Dugan & Meyers.[9] We, therefore, find that the district court erred in finding that the purchase order dated August 28 was properly characterized as an offer to purchase.

The district court found that Worthington's argument that the three Worthington letters of May 15, 1974, May 17, 1974

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[8] The district court also was in error in finding that Rayburn testified that "defendant orally agreed to be bound by the warranty to the City". Rayburn had no recollection of ever discussing the warranty with Worthington.

[9] The delay between the date of the formal acknowledgment of October 2, 1974 and Dugan & Meyers' receipt on October 14, 1974 is not explained.

and August 26, 1974 constituted an offer to the "joint venture [could] not be sustained" because the "joint venture never entered into negotiations with Worthington until substantially after the time in which any offer contained thereon lapsed." This finding is clearly erroneous for a number of reasons. First, the May 15, 1974 and May 17, 1974 letters described precisely the items Worthington proposed to provide. The August 26, 1974 letter contains the same quote number as the May 15, 1974 letter and the August 26, 1974 letter was acknowledged to be a "revised proposal". Second, the acknowledgment by Worthington on October 2, 1974 references the quote number and prior letters as well as the terms of payment first described in the May 15, 1974 letter. The basic data regarding the specifications and performance of the Worthington pumps which the successful bidder was required to pass on to the District is contained in the May 17, 1974 letter. Further, there was no lapse in the Worthington offer which was received when the joint venture entered the negotiations. Even before the prime contract was awarded and the change to Worthington pumps approved, Worthington was obligated to furnish the pumps, motors and control equipment. See *United States* v. *McShain*, 258 F.2d 422 (D.C.Cir. 1958); Restatement (Second) of Contracts § 87 comment e, illustration 6. Lastly, the suggestion that somehow the joint venture was a new party on the scene was clearly incorrect. Dugan & Meyers through E.C.I., its wholly owned subsidiary, bid contract 3A and was awarded Contract 3A. Dugan & Meyers, for the most part, conducted all the negotiations with Worthington.

The district court found that because Worthington included in the acknowledgment of October 2, 1974 additional or different warranty terms from those contained in the purchase order of August 28, 1974, Worthington could not require plaintiffs to object to such additional terms. This tying of the acknowledgment of October 2, 1974 to the purchase order was improper since, as we have previously described, by the time the purchase order was prepared the parties had entered into the subcontract.

The district court's ultimate finding that the parties never agreed on the Worthington warranty, as reinforced by the exchange of correspondence regarding Worthington's failure to sign the purchase order, was also clearly erroneous. There is just nothing in the correspondence or in the testimony to even suggest that Slack's desire to have Worthington sign the Dugan & Meyers' purchase order was anything more than a formality to complete his file.

3.

Based on its findings, the district court concluded that the parties never came to an agreement on Worthington's express warranty. This conclusion was the same, the district court said, whether the Worthington letter of August 26, 1974 or the purchase order dated August 28, 1974 was the starting point of the negotiations. According to the district court, if the August 26, 1974 proposal was the offer which plaintiffs subsequently accepted, there was no express warranty because this letter included no mention of a warranty. If the purchase order was the starting point, again there was no express warranty because Worthington's acknowledgment under Ohio Rev. Code § 1302.10(A) (U.C.C. 2-207) was an acceptance without regard to inclusion of the warranty provisions on the reverse side. Under the circumstances as found by the district court absent an agreement on a warranty, "resort to the Code to furnish the applicable warranties does not interfere unfairly with the legitimate expectation of the parties".

The evidence seems clear, however, that the award of the contract to the joint venture could not have been made without consideration and approval by the District of Worthington's letter proposals of May 15, 1974 and May 17, 1974, since the forms of proposal required a detailed submission of certain data which was outlined in these letters. Clearly, these letters together with the letter of August 26, 1974 constituted Worthington's offer to furnish the pumps, motors and control panels. The offer remained irrevocable until E.C.I. had a reasonable opportunity to notify Worthington of the

award by the District and its acceptance of Worthington's offer. See Restatement (Second) of Contracts, *supra*. E.C.I.'s notification of the award to Worthington constituted acceptance of Worthington's offer and of Worthington's express limited warranty as stated in the May 15, 1974 letter. The fact that Worthington's warranty terms conflicted with the warranty in the general contract with the District is of no significance since a subcontractor is free to contract in any manner it desires and, in case of conflict, the terms of the subcontract prevail. *John W. Johnson, Inc.* v. *Basic Construction Co.*, 429 F.2d 764 (D.C.Cir. 1970); *McKinney Drilling Co.* v. *The Collins Co.*, 517 F.Supp. 320 (N.D. Ala. 1981). The parties in fact agreed on Worthington's limited warranty. It was neither necessary nor appropriate to resort to the Code. See Squillante, *Warranty Sales Law in Ohio*, 31 Case W.Res. 211, 213 (1981); *Inglis* v. *American Motors Corp.*, 3 Ohio St.2d 132, 209 N.E.2d 583 (1965).

III.

Alternatively, we find that the district court erred in concluding that Worthington breached an implied warranty of merchantability and fitness for a particular purpose, Ohio Rev. Code § 1302.27 (U.C.C. § 2-314) and Ohio Rev. Code § 1302.28 (U.C.C. § 2-315). In so doing we do not take issue with the basic finding of the district court that the mixed liquor pumping system did not properly perform and that the immediate cause of its malfunctioning was the failure of the pumps to properly operate. The district court's conclusion on imposing implied warranty liability depended on the conclusion that plaintiffs relied upon the skill and expertise of Worthington in the choice of motors. The district court's conclusion was also based on its rationale concerning the scope of the work undertaken by Worthington. Assuming Worthington was obligated under an implied warranty as to its work based on these conclusions, absent a finding that the equipment delivered by Worthington did not meet the specifications or that there were defects in the equipment at the time

it was delivered, Worthington is not liable. *McDonald* v. *Ford Motor Co.*, 42 Ohio St.2d 8, 326 N.E.2d 252 (1975).

As to what actually happened at the Plant there is no disagreement. The pumps were tested and approved at a Worthington facility in January and March 1976. The last of the motors was shipped on September 30, 1976. The mixed liquor pumping system was first tested in July 1977. The Plant began operating in the Spring of 1978. The first trouble with the mixed liquor pumping system began with pumps 6 and 8 in June 1978. Additional difficulties with the motors were encountered in August 1978. Lastly, the mixed liquor pumping system has never worked satisfactorily as a whole. However, the district court did not make an express finding on the cause of the failure of the motors and there is nothing in the record which indicates whether the failure of the motors to operate properly was caused by a defect in their manufacture or as a result of the way the system is operated.

A.

The test for finding an implied warranty of fitness for a particular purpose had been described as follows:

> First, the seller must be aware at the time of contracting of a particular purpose for which the buyer intends to use the goods. Second, the buyer must rely on the seller's skill or judgment to select or furnish goods suitable for that particular purpose. Ohio Rev. Code Ann. § 1302.28. . . .

Price Brothers Co. v. *Philadelphia Gear Corp.*, 649 F.2d 416, 423 (6th Cir. 1981).

The district court found that Item 21 essentially provided for a performance specification and that in selecting Worthington "plaintiff . . . relied on Worthington's expertise as a manufacturer of pumps to select a system of pumps, motors and controls which would meet this performance specification". This finding was incorrect. Worthington was specifically asked to use Continental motors and Autocron controls to reduce its price; Worthington had initially proposed

to use Westinghouse motors and controls. The district court was also clearly erroneous when it concluded that:

> The joint venture contracted with Worthington, the manufacturer of the major component pumps to supply a system which would meet the performance specification of the general contract. Plaintiff relied upon defendants' expertise in selecting the appropriate systems and Worthington was aware of that reliance.

Had this been the parties' actual intention it would have been a simple matter for Worthington to have proposed to be responsible for Item 21 in its entirety rather than the discrete parts described in its May 15, 1974 and August 26, 1974 letters.

In *Price Brothers, supra,* we held that the trial court's conclusion that the defendant breached an implied warranty of fitness for a particular purpose was clearly erroneous because of the degree of specificity in the buyer's purchase order and the buyer's own undisputed expertise. Here, the trial court's finding that plaintiffs relied on Worthington's superior expertise cannot be sustained since regardless of whether or not Worthington possessed greater expertise than plaintiffs, Worthington did not choose all of the equipment covered by the subcontract.

B.

Worthington never undertook to provide the complete mixed liquor pumping system as described in Item 21, but instead confined its obligation to specific parts which did not include among other things, the piping and electrical wiring.[10]

The district court found as we have described that the mixed liquor pumping system failed to perform in the manner intended. In making this finding, the court also found that all of the component parts were supplied by Worthington. While it is true that the pump system failed to perform in the man-

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[10] See footnote 2, *supra*.

ner intended, it is not correct that "all" of "the component parts" were "supplied" by Worthington. As above described, Worthington had no responsibility for components of the system which others, including the contractor, were obligated to furnish. A failure of the system to operate properly does not by itself mean that equipment supplied by Worthington, which constituted but a part of the mixed liquor pumping system, was defective.

C.

The implied warranty of merchantability is breached when goods are not of an acceptable quality when compared to that generally acceptable in the trade for goods of the kind. Ohio Rev. Code Ann. § 1302.27; *Price Brothers, supra* at 424. As noted above, there was no evidence that the particular equipment furnished by Worthington did not meet specifications. Nor was evidence introduced to show the existence of any defect in the equipment at the time it was delivered.

Under Ohio law, the plaintiff in a breach of warranty case carries the burden of proving that a defect exists in the product manufactured and sold by the defendant, and that the defect existed at the time the product left the defendant's control. *McDonald* v. *Ford Motor Co., supra.*[11] The fact that the

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[11] This is the general rule. The official commentary (Purposes of Changes ¶ 13) to Uniform Commercial Code Section 2-314 reads in part:

> In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained.

Thus, it is generally held that in order to prevail in an action for breach of the implied warranty of merchantability, the plaintiff must prove that the seller sold goods which were not merchantable at the time of delivery. See e.g. *Bilotta* v. *Kelley Co.*, 346 N.W.2d 616 (Minn. 1984); *Falker* v. *Chrysler Corp.*, 119 Misc.2d 375, 463 N.Y.S.2d 357 (1983); *F & S Offshore, Inc.* v. *Service Machine & Shipbuilding Corp.*, 430 So.2d 1167 (La.Ct. App. 1983); *Alfa Romeo, Inc.* v. *S.S. "Torinia"*, 499 F.Supp. 1272 (S.D.N.Y. 1980); *Jensen* v. *American Motors Corp.*, 437 A.2d 242 (Md. 1981). While the plaintiff can establish that the goods were not merchantable by showing

mixed liquor pumping system failed to work properly does not by itself link any specific defect to Worthington. Nor does it provide any basis for finding that any component part supplied by Worthington was defective when delivered.

The cases relied on by plaintiffs are not to the contrary. In *Edwards-Warren Tire Co.* v. *J.J. Blazer Construction Co.*, 565 F.2d 401 (6th Cir. 1977), we upheld a jury award in favor of an Ohio buyer of a quantity of earth-mover tires on the ground the seller had breached an implied warranty of merchantability. In addressing the seller's assertion that the buyer failed to make out a *prima facie* case that the tires were defective at point of purchase, we said:

> From the eyewitness accounts of Blazer's "tireman", Herb Azbell, a man with seven and one-half years of tire maintenance experience, the jury could rationally deduce that the structural disintegration of a majority of the tires, after short periods of service under normal operating conditions, was caused by latent defects attributable to the manufacturer . . . . It was then the manufacturer's option to present, as an affirmative defense, evidence of product misuse or other intervening cause.

565 F.2d at 404.

Similarly, in *Jetero Construction Co.* v. *South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976), we held the trial court's conclusion that the seller failed to deliver goods which were of a quality called for by the sales contract was supported by physical evidence introduced at trial. In that case, the buyer, who "was not an expert on lumber grading", relied on the seller's expertise in ordering "60,000 '2' x '4' x '92 5/8' #2 spruce studs". *Id.* at 1350. The first 16,000 studs delivered by the seller had painted red ends like those in the sample shown to the buyer. The remaining shipments contained

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direct evidence of a specific defect or through circumstantial evidence, the plaintiff shoulders the burden of producing substantial evidence that the injury and damages were caused proximately and in fact by the defective nature of the goods.

studs with either green or unpainted ends and "did not appear to be of as high a quality as the earlier shipments". *Id.* In affirming the district court we said:

> The District Court . . . had before it the testimony of Luther Johnson, a Georgia lumber supplier, that #2 grade studs would not have warped, bowed and discolored to the extent that the SML green end and unpainted studs did. The District Court also was able to examine Exhibit 3, a discolored stud submitted as an example of the studs at issue. The stud bore the grade mark "stud" and had no markings indicating that it was of number two quality or equivalent. This evidence and testimony provides a substantial basis for the District Court's finding. (footnotes omitted)

531 F.2d at 1354 (footnote omitted).

Here, Worthington was not required to show conclusively that the pump failures resulted from some cause other than a defect or defects in the component parts supplied by Worthington. Instead, the burden in the first instance was on plaintiffs to show the existence of a defect in the equipment supplied by Worthington at the time of delivery. In light of plaintiffs complete failure to introduce evidence that the equipment supplied by Worthington did not meet plaintiffs' specifications or was in some way defective, Worthington was not shown to have breached an implied warranty of merchantability.

IV. Conclusion

Worthington's limited warranty terms were a part of the subcontract. There was no basis for resorting to the Code to supply any warranties, particularly an implied warranty of merchantability and fitness for a particular purpose. Even if it was proper to imply a warranty of merchantability and fitness for a particular purpose in the subcontract between plaintiffs and Worthington, plaintiffs failed to carry their burden in establishing a breach of the subcontract. There was no evidence to show either that Worthington supplied all of

the equipment or that the equipment Worthington did supply did not meet plaintiffs' specifications or was defective at the time it was delivered.

The judgment of the district court is REVERSED.

CONTIE, Circuit Judge, concurring.

I concur in Parts I and II of the majority opinion. Since our holding that the implied warranties were disclaimed properly disposed of this case, I do not reach the issues discussed in Part III of the majority opinion.

The majority apparently construes Worthington's May 1974 letters as a viable offer even after the joint venture entered the picture in late June or early July. App. at 116. However, because Worthington specified that the May offer remained open only for 30 days, the offer lapsed prior to formation of the joint venture. App. at 473.[1] Worthington's letter of August 26 referred to "Our Proposal CLV-129-74E-PL," thereby incorporating the disclaimer of implied warranties.[2] I agree with the majority that the offer was accepted by the joint venture through a verbal purchase order on August 28. This offer and acceptance, including the warranty disclaimer, constituted the contract.

The implied warranty of merchantability may be excluded by a conspicuous disclaimer which mentions merchantability; the implied warranty of fitness may be excluded by a conspicuous written disclaimer. Ohio Rev. Code § 1302.29(B). Since the written disclaimer mentions merchantability, only the disclaimer's conspicuousness is addressed. The question of

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[1] Even where there is a written agreement to hold an offer open, the period of irrevocability may not exceed three months. O.R.C. § 1302.08.

[2] The disclaimer stated:

> WORTHINGTON MAKES NO OTHER WARRANTY OF ANY KIND WHATSOEVER, EXPRESSED OR IMPLIED; AND ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED BY WORTHINGTON AND EXCLUDED FROM THESE TERMS OF SALE.

conspicuousness is one of law which this court may consider *de novo*. *Delhomme Industries, Inc.* v. *Houston Beechcraft*, 669 F.2d 1049, 1061 (5th Cir. 1982). Ohio Rev. Code § 1301.01(J) provides:

> "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

The disclaimer was clearly conspicuous in the May documents because it was printed in all capital letters, thereby contrasting with the remainder of the document. Whether incorporation of the disclaimer by reference in the August letter satisfied the requirement of conspicuousness requires consideration of the bargaining strength and commercial sophistication of the parties and whether the party attempting to avoid the disclaimer had actual knowledge of the disclaimer at the time of the transaction. *AMF, Inc.* v. *Computer Automation, Inc.*, 573 F.Supp. 924, 929 (S.D. Ohio 1983) (applying California law). Under Ohio law, a disclaimer has been found conspicuous when the buyer, a commercial entity, had actual knowledge of the disclaimer which was common in the industry. *Marion Audiovisual, Etc.* v. *Eastman Kodak Co.*, 487 F.Supp. 371, 374-75 (N.D. Ohio 1980); *FMC Finance Corp.* v. *Murphee*, 632 F.2d 413, 419 (5th Cir. 1980); *Office Supply Co., Inc.* v. *Basic Form Corporation*, 538 F.Supp. 776, 784-86 (E.D. Wis. 1982); *Fargo Machine & Tool Co.* v. *Kearney & Trecker Corp.*, 428 F.Supp. 364, 372 (E.D. Mich. 1977).

The testimony indicated that the joint venture was a sophisticated business entity, whose participants had built several major sewage treatment plants in Kentucky, Ohio and Indiana. App. at 104. The testimony of Lawrence Rayburn of the Goettle Co. and George Cramer of Dugan & Meyers

established that the joint venture was aware of the warranty provisions in Worthington's May letter (App. at 118, 138) and that such a warranty was standard in the industry (App. at 131). Therefore, the disclaimer was conspicuous and barred appellees' warranty claims.

Accordingly, I concur with the majority that the judgment of the district court be reversed.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-80-604

DUGAN & MEYERS CONSTRUCTION CO., INC. and THE GOETTLE CO., A Joint Venture,
Plaintiff

v.

WORTHINGTON PUMP CORPORATION (USA),
Defendant,
Third-Party Plaintiff

v.

CONTINENTAL ELECTRIC CO., INC.,
Third-Party Defendant.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

(Filed April 20, 1983)

This matter is before the Court following trial of the claims of plaintiff against defendant Worthington Pump Corporation (Worthington).[1] In accordance with Rule 52 of the Federal Rules of Civil Procedure the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law.

[1] Pursuant to Rule 42 of the Federal Rules of Civil Procedure, this Court severed the third party action between Worthington and Continental Electric Company. Counsel for third party defendant Continental was present during the trial of the primary action and conducted some interrogation.

I. Introduction

This is an action for breach of contract, breach of warranty, negligence and negligent misrepresentation arising out of the purchase and sale of a "mixed liquor" pumping system.[2] In 1974, Dugan & Meyers Construction Co. (Dugan & Meyers) was awarded the contract for a portion of the construction of a secondary sewage treatment facility at the Little Miami Wastewater Treatment Plant.[3] This contract, designated "3A", covered general construction of the facility and included 44 separate work "items." Dugan & Meyers and the Goettle Company subsequently entered into a joint venture to perform work items 11, 12-25, and 27-30, essentially the mechanical portion of the contract. Plaintiff in this action is the joint venture.

Item 21, at issue herein, called for mixed liquor pumping equipment which would pump wastewater (mixed liquor) from aeration tanks to final settling tanks. The specifications for Contract 3A described the item as follows:

> ". . . a complete mixed liquor pumping installation consisting of eight (8) horizontal, centrifugal, mixed flow type pumps, driven by variable speed, wound rotor motors. Drivers and pumps shall be direct connected through flexible couplings and mounted on a common bedplate. Included also is the complete control installation. Two complete systems will be furnished, one for each bank (east and west) of pumps, each bank consisting of four (4) pumps."

Defendant Worthington Pump Corporation (Worthington) supplied the pumps and related equipment under item 21 to the joint venture.

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[2] The negligence and negligent misrepresentation claims were apparently abandoned prior to trial and no evidence was offered with respect to these claims.

[3] Engineering Construction, Inc., (ECI), a wholly-owned subsidiary of Dugan & Meyers, was actually the successful bidder on Contract 3A. It was later dissolved, however, and is now a division of Dugan & Meyers. "Dugan & Meyers" as used herein will also include references to E.C.I.

II. Findings of Fact

A. Contract Formation

(1) On May 15, 1974, defendant Worthington circulated a proposal for "major equipment offerings," including the pump units and related equipment called for under item 21, to all contractors who intended to bid on Contract 3A. (Joint Ex. 8). Both Dugan & Meyers and The Goettle Company received copies of this proposal and a supplement to it dated May 17, 1974. (Joint Ex. 10). The proposal expressly incorporated an attached mimeographed sheet entitled "Worthington Standard Conditions of Sale," whereby the defendant set forth an express warranty and disclaimed all implied warranties.[4] The attached sheet also contained the following statement:

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[4] The Conditions of Sale included the following warranty provision:

1. Warranty, Remedy, Disclaimer

Worthington warrants for a period of one year from the date of shipment, the equipment of its own manufacture to be delivered hereunder against defects in material and workmanship, under normal use and service when used and maintained in accordance with instructions supplied by Worthington. This is Worthington's sole and exclusive warranty. . . . If such a defect appears within one year from the date of shipment and Purchaser has given Worthington immediate written notice of same, Worthington will repair the part or at its option replace the part . . . or at its option refund an equitable portion of the purchase price . . . Any descriptions of the equipment, any specifications, and any samples, models, bulletins, or similar material, used in connection with this sale are for the sole purpose of identifying the equipment and are not to be construed as express warranties. WORTHINGTON MAKES NO OTHER WARRANTY OF ANY KIND WHATSOEVER, EXPRESSED OR IMPLIED, AND ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED BY WORTHINGTON AND EXCLUDED FROM THESE TERMS OF SALE. The Purchaser's sole and exclusive remedy, whether based upon warranty, contract or tort, including negligence, will be to proceed under this warranty. All liability of Worthington shall terminate one year from the date of shipment of the equipment . . .

[footnote continued on following page]

"This proposal shall remain open for thirty (30) days and in the meantime may be changed or withdrawn. The terms of this proposal shall exclusively govern the sale and Purchaser's acceptance of this proposal is expressly limited to those terms. Worthington hereby gives notice that it objects to any additional or different terms which may be contained in any order by purchaser. Any acceptance by Worthington is expresly conditioned on assent by Purchaser to Worthington's terms."

The May 17th supplement to the proposal extended the term of Worthington's express warranty to include one year from acceptance not to exceed 18 months from shipment, and provided a payment term of 90% upon delivery, 10% upon acceptance.

(2) In submitting its bid on Contract 3A, Dugan & Meyers did not list Worthington as its intended supplier under item 21. Instead, Dugan & Meyers originally intended to subcontract the mechanical part of the contract to Cebor Company, which listed Morris Pump Company as its supplier of the mixed liquor pumps called for in item 21.

(3) Dugan & Meyers was the successful bidder on Contract 3A. Sometime during the summer of 1974, after Dugan & Meyers was awarded Contract 3A, Dugan & Meyers and The Goettle Company determined to form a joint venture to perform the mechanical portion of the contract. After reviewing

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2. Limitation of Liability

Worthington shall not in any event be liable for special, indirect, incidental or consequential damages. Worthington's liability on any claim of any kind, including negligence, for any loss or damage arising out of, connected with, or resulting from this contract, or the performance or breach thereof, or the design, manufacture, sale, delivery, resale, installation, technical direction of installation, inspection, repair, operation or use of any equipment covered by or furnished under this contract shall in no case exceed the price paid by the Purchaser for the equipment. Worthington also disclaims all liability, whether in contract, tort, warranty, or otherwise, to any party other than Purchaser. (Joint Ex. 8)

the equipment proposals previously submitted by Worthington and two other pump manufacturers and negotiating with representatives of those companies, the joint venture elected to purchase the pumping equipment from Worthington.

(4) The first and only direct negotiations between the plaintiff joint venture and Worthington occurred during August of 1974. A proposal by defendant dated August 26, 1974 confirmed data previously given orally to Mr. Larry Rayburn, an officer of The Goettle Company, as to price, delivery, intended suppliers of the required motors and control systems, and contained a general description of the pumps and their functional capacity. Although the proposal number utilized in this August correspondence was the same as that of the May 15th proposal, the August 26 document made no reference to warranties and no mimeographed sheet of Worthington's Standard Conditions of Sale was incorporated or attached. (Joint Ex. 11).

(5) George Kramer, an officer of Dugan & Meyers, testified at trial that the warranty on the pumps was discussed during his negotiations with Carroll Robertson, Sales Representative for Worthington. He stated that he advised Worthington that its previous warranty was inadequate and that the plaintiff would require all equipment suppliers to be bound by the warranty to the City contained in Contract 3A. Mr. Robertson testified that he could not recall any such discussion.

(6) On August 28, 1974, plaintiff notified defendant orally of its intent to purchase the pumping equipment required under Item 21 from Worthington. (Joint Ex. 12). A purchase order was prepared on that date which provided in pertinent part:

> Pumps for items 21 & 29, as per your quote and Plans & Specifications.
>
> Lot Price $570,250.00
>
> F.O.B. jobsite
>
> * * *
>
> *Note*: This purchase order is a firm commitment on the

part of the seller to provide the material listed at the price stated and within the scheduled requirements. D&M will not accept any cost escalation whatsoever.

* * *

ACCEPTED BY
WORTHINGTON SALES INTERNATIONAL

By: _____
Date: _____

(7) On September 3, 1974, plaintiff advised defendant that it had requested approval by the City of the substitution of Worthington Pumps for the Morris equipment previously listed and that upon such approval, it would "purchase this equipment from Worthington Pump in accordance with [Worthington's] latest quote dated August 26, 1974." (Joint Ex. 13). The City gave its approval on or about September 30, 1974 (Joint Ex. 16), and the August 28th purchase order was formally sent to Worthington on October 8, 1974.

(8) On October 2, 1974, defendant mailed plaintiff an "Acknowledgment Copy" of plaintiff's purchase order.[5] (Joint Ex. 17). In addition to a description of the pumps and the terms of payment, the following warranty was stated on the face of the document:

> **Warranty**
> Worthington's standard warranty except extended to one (1) year from acceptance (start up or beneficial use) not to exceed eighteen (18) months from shipment.

The Acknowledgment Copy also contained at the top this imprinted notation:

> "Notwithstanding any inconsistent or additional terms which may be contained in your purchase order, this ac-

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[5] Since defendant did not receive the actual purchase order document until October 8, 1974, the Acknowledgment Copy presumably refers to the September 3 letter wherein plaintiff stated its intention to purchase the equipment from defendant subject to the City's approval.

> ceptance is expressly conditioned upon assent to the terms and conditions set forth below and on the reverse side hereof. Purchaser shall be conclusively deemed to have accepted the terms of this acknowledgment as the sole terms of this sale, unless he notifies Worthington to the contrary within ten (10) days after his receipt of this acknowledgment."

The reverse side of the form contained Worthington's standard sale terms including the same express warranty and disclaimer of implied warranties contained in the May 15th proposal. (See footnote 4, *supra*.)

(9) On or about November 8, 1974, plaintiff and defendant agreed to amend the purchase order to omit an order for certain equipment required under item 29. The total purchase price was accordingly changed to $527,457.00, and the payment term to "no retainage." (Joint Ex. 21). Defendant responded by sending another of its standard Acknowledgment Copy forms reflecting such changes. (Joint Ex. 22).

(10) In January and February of 1975, the plaintiff notified the defendant on two occasions that it had not yet received a signed copy of the plaintiff's purchase order. (Joint Exs. 27, 29). On March 4, 1975, R.G. Campbell, District Manager of the defendant, sent the following reply:

> "Worthington accepts all customer purchase orders on the Standard Worthington Acknowledgment Form and does not, under any circumstances, sign the acceptance copy of the customer's purchase order. Worthington will sell its products only on the terms and conditions contained in its Standard Acknowledgment Form and signature of the customer purchase order may indicate agreement to the terms contained in the purchase order. Therefore, we refer you to the Worthington Acknowledgment Form as evidence that your purchase order has been acknowledged. (Joint Ex. 30).

Plaintiff did not reply to defendant's letter of March 4, 1976.

(11) Contrary to the language quoted above, Carroll Robertson testified that Worthington will in some cases sign

customer purchase orders. The record also includes two internal memoranda in which Worthington employees urged that plaintiff's purchase order be signed and returned. (Joint Exs. 25, 28).

B. Breach of Warranty

(1) In late 1975 and early 1976, the parties negotiated a change in their agreement allowing for separate shipment of the pumps and motors. Plaintiff agreed to set the motors and pumps at the site, subject to Worthington's obligation to supervise alignment and performance. In return, Worthington agreed to allow plaintiff a back-charge for its costs in setting the pumps and motors. (Joint Exs. 31-35, 38).

(2) The pumps manufactured by Worthington were delivered to the Little Miami facility during the months of March and April, 1976. The motors were subsequently delivered in July, October and December of 1976. When plaintiff attempted to align the pumps and motors, it became apparent that alignment was impossible because the shafts on all motors were significantly higher than the pump shafts. Worthington was consulted regarding this problem and it was ultimately determined to disassemble the pumps from the mounting or bedplate, lower the bedplate, and place "shims" in between the gap. This lowered the motor shaft so that alignment was achieved. Worthington's representatives verified the initial misalignment and supervised the adjustment. The alignment problem was apparently resolved by January of 1977 and the cost thereof credited to plaintiff's account.

(3) Final installation and initial field testing of the pumps and related equipment occurred in the late Spring and Summer of 1977. Tests conducted at this time, however, utilized water rather than sewage, since sewage was not brought to the plant until the Summer of 1978. Although various minor problems with the pump units were encountered during this period, most were resolved under the supervision of Worthington's service representatives. Such problems and adjustments do not appear to have been unusual or unexpected for installations of equipment of this sort.

(4) The first significant problem noted with respect to any of the equipment supplied by Worthington involved excessive vibration of pump No. 8. This was first reported to Worthington and observed by its representative in September of 1977. (Pltf's. Ex. 56, Joint Ex. 44). The parties agreed, however, that Worthington would not send its "vibration man" until full start-up of the facility by the Miami Sewer District. (Pltf's. Ex. 57).

(5) Occupancy of the secondary facility was formally turned over to the City on October 10, 1977. The pumps apparently sat idle, however, from July of 1977 until the Spring of 1978. (Joint Ex. 75, (Def's. Exs. G, LL). City records indicate that operations at the facility began in approximately May of 1978 and that the pumps were put in operation by mid-June. (Def's. Exs. AA, BB). From this time on, the pump units experienced a multitude of problems.

(6) On June 22, 1978, plaintiff advised Worthington that unit No. 6 was experiencing a "bearing squeal" and unit No. 8 a "bad wobble." (Joint Exs. 45, 46). A service representative was sent by Worthington some six weeks later. (Joint Ex. 47). At that time, the service representative performed time and temperature tests on units 1, 3 and 6 and verified unit 8's excessive vibration. He concluded, however, that it did not justify "pulling the rotating assembly and sending it back to check the balance." The service representative also noted that "all eight pumps are designed to backwash, and will start while the pumps are rotating backwards."

(7) Defendant was next advised of problems with the pump units as a result of the City's September 29, 1978 "punch list" wherein problems under Contract 3A were identified to the plaintiff. Plaintiff contacted Worthington regarding the problem described as "excessive vibration of unit No. 8." On October 10, 1978, Worthington agreed to send a representative to the job site on November 27, 1978. (Joint Ex. 48). Other items on the punch list relating to the pump units involved No. 7, which was reported to "kick off periodically in the hand or manual position with no alarms," and the motor of

unit No. 5, in which the rotor allegedly hit the stator in high speed. Plaintiff apparently contacted H.P. Thompson, sales representative of Autocon, the manufacturer of the controls, and Continental Electric, the manufacturer of the motors, directly with respect to these complaints.

(8) On October 22, 1978, plaintiff notified Worthington that four or five of the eight motors were experiencing problems.[6] Specifically, the rotors were reported to be "rubbing against the stators." (Joint Ex. 50). After some discussions between plaintiff, Worthington, and Continental Electric, it was decided that a single motor would be sent to Continental for testing. (Joint Ex. 50). This was done on November 13, 1978. Other than Continental's agreement to pay for the cost of shipment of the single motor, there was no understanding at that time as to who would ultimately assume the cost of the necessary repairs.

(9) On November 7, 1978, Worthington was notified of a vibration problem with unit No. 8, and it again agreed to send a service representative to the facility. (Joint Ex. 50, Pltf's. Ex. 61). When the serviceman reported to the facility on November 29, 1978, he found that the pump vibrated and that the unit was experiencing the same motor problems as reported for the other units, i.e., that the rotor was rubbing or hitting against the stator and that the insulation within the motor was burning or smoking. Althought it is not entirely clear, the report appears to attribute much of the excessive vibration of the pump to the motor, since vibration tests conducted on the uncoupled motor were substantially higher than those readings obtained from the combined motor and pump unit. (Pltf's. Ex. 59).

(10) On December 5, 1978, Continental reported that its test on the motor returned in November (Unit No. 4), revealed that the shaft of the motor was bent. Continental ad-

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[6] Records of the facility indicate that the motor in unit No. 5 failed on June 27, 1978 and that four additional motors failed successively on October 12, (No. 6); October 25, (No. 8); October 26, (No. 3); and October 29, (No. 4). (Def's. Exs. AA, BB, LL; Joint Exs. 157, 158, 159).

vised that to repair it would require a new shaft and complete refurnishing of the windings, bearings and brushes, at a total cost of $13,750.00 plus transportation. (Joint Ex. 52, Pltf's. Ex. 65). Plaintiff at that time looked to Worthington to "resolve this problem," considering it defendant's responsibility. (Joint Ex. 52). Worthington responded on January 16, 1979 contending that it had fulfilled its contractual obligations and that all units were out of warranty. (Joint Ex. 54).

(11) All five of the motors which failed during 1978 were eventually returned to and repaired by Continental Electric during the years 1979 and 1980. Two of the motors required the same extensive repairs required by unit No. 4, at approximately the same per-unit cost. The other two units were repaired at considerably less expense.

(12) In the interim, however, the motors on two of the units which had not failed in 1978 experienced related failures on December 18, 1979 (Unit 1) and February 20, 1980 (Unit 2). (Def's. Ex. AA, BB, LL; Joint Exs. 157-159). The repairs undertaken previously on the other motors by both Continental and other companies also proved less than effective. A summary of these events follows:

(a) Motor No. 4 was returned to the Little Miami facility on December 21, 1979 and put back in service. It experienced a variety of problems and on April 12, 1980 the motor failed again. (Def's. Ex. AA, BB). Further repairs on motor No. 4 were performed by both A.R. Industries and General Electric. (Joint Exs. 119, 120, 160).

(b) Motor No. 1 was repaired by both A.R. Industries and Matlock Electric and returned to service on April 10, 1980. (Joint Exs. 88, 89; Pltf's. Ex. 113; Def's. Ex. AA). It failed again on January 27, 1981 and was subsequently repaired by General Electric and Matlock Electric. (Joint Exs. 90-99).

(c) Motor No. 2 was repaired by A.R. Industries and returned to service on April 15, 1980. (Joint Ex. 29; Def's. Ex. AA).

(d) Motor No. 3 was repaired by Continental Electric and returned to the facility in August of 1980. Since that

time, motor No. 3 has been subjected to various tests by the Miami Sewer District and accordingly has not seen much operation. (Joint Exs. 105-155; Pltf's. Ex. 120).

(e) Motor No. 5 was repaired by Continental Electric but failed again two days after it had been returned to service on May 14, 1980. (Joint Ex. 132; Def's. Exs. AA, BB). It has been inoperable since that time.

(f) Motor No. 6 exhibited a similar pattern. Seven days after its return from Continental Electric for repairs it failed again. (Def's. Exs. AA, BB, LL). No further repairs have been undertaken on unit No. 6.

(g) Continental repaired motor No. 8 and returned it to the facility on August 4, 1980. (Def's. Exs. AA, BB, LL). It has been essentially operable since that time.

(13) It is clear that Item 21 of contract 3A was essentially a "performance specification." (Testimony of Lawrence J. Papes, Chief Engineer of Havens & Emerson). In the case of a performance specification the owner and/or contractor relies upon the supplier to select that type of equipment which will render the stated performance. Plaintiff, in selecting Worthington as its supplier of equipment under item 21, relied upon Worthington's expertise as a manufacturer of pumps to select a system of pumps, motors and controls which would meet this performance specification.

(14) Throughout the period of its use, the pumping equipment has failed to operate in the manner intended under Contract 3A and the Plans and Specifications. Although the incoming flow at the facility to date has generally required that only two pumps be operable at any one time, the system called for under the Plans and Specifications contemplated that pumps would be used in specific pairs, capable of varying the speed between them in accordance with the incoming flow. There has rarely been an operable pair to enable the system to perform in such a manner, however, and the facility has been forced to utilize whichever pump or pumps were functional at a specific point in time. As a result, the facility has functioned with less flexibility and efficiency than an-

ticipated. It also appears that the lack of operable pump units has prevented the facility from operating in a "two-stage" mode, although no damages were claimed in this regard.

C. Damages

(1) The following expenses were incurred by the plaintiff joint venture in attempts to repair the various pump units:

(a) $4,302.50 in labor costs expended in removing and returning equipment, receiving and re-installing equipment, and stiffening and testing of returned equipment. (Pltf's. Ex. 96).

(b) $500.00 worth of equipment in connection with above services (Pltf's. Ex. 97);

(c) $1385.00 worth of materials in connection with the above services (Pltf's. Ex. 105);

(d) $873.19 expended in subcontracting repairs to Matlock Electric ($213.19) and for evaluation of pumps by Structural Dynamics Research Corp. (S.D.R.C.) ($660.00) (Pltf's. Exs. 106, 96);

(e) $49,500.00 to Continental Electric for repairs to motor 3, ($14,400.00); motor 4, ($13,750.00); motor 5 ($3,600.00); motor 6 ($3,600.00); and motor 8 (14,150.00). (Pltf's. Exs. 107, 117, 128, 138, 147).

(f) $1,805.20 in freight attributable to the repairs by Continental listed above. (Pltf's. Exs. 108, 129, 139, 148).

(2) The City of Cincinnati has incurred the following expenses with respect to the mixed liquor pump system:

(a) $35,663.00 in labor costs (Pltf's. Exs. 108, 109).

(b) $1,401.74 in materials (Pltf's. Ex. 110).

(c) $24,832.00 for repairs to motors 1 and 5 by Matlock Electric, General Electric, Industrial Electric, and A.R. Industries. (Pltf's Exs. 111-113).

(d) $19,950.00 for a constant speed motor to act as a back-up for the Continental motors ($18,350.00) and

labor costs associated therewith ($1,600.00). (Pltf's. Ex. 114).

(e) $16,345.00 for the repair of motor 4 by Bertke Electric (Pltf's. Ex. 116).

(f) $1,645.00 for the installation of time-delay relays.

(g) $120,802.17 to S.D.R.C. for expert analysis of the system, including the reasons for its failure and the measures necessary for its correction. (Pltf's. Exs. 117-121).

(3) Testimony was presented that the City intends to follow the recommendations of S.D.R.C. The City anticipates that on the basis of such recommendations, it will incur an additional $145,621.10 in costs to remedy the system.

(4) Mr. Arthur Tout, principal engineer with the Metropolitan Sewer District testified that the City is looking to Dugan & Meyers, the contractor, to reimburse it for the cost of the above repairs and analysis undertaken by S.D.R.C.

III. Opinion

A. Contract Formation

The Court must initially determine the terms of the parties' agreement and the nature and extent of any warranties which attached to the sale of the mixed liquor pumps and related equipment. The parties agree that this transaction is governed by Ohio's version of the Uniform Commercial Code, O.R.C. § 1302 *et seq.*

Ohio Revised Code § 1302.07 (UCC 2-204) provides generally:

> (A) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (B) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(C) Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

There is no single document in this case which sets forth the parties' agreement or which was signed by both the plaintiff and defendant. The Court also finds that the parties did not intend to reach a binding oral agreement as to the terms of the contract.[7] From the evidence presented, it is clear that the parties did not contemplate that the proposed sale would be enforceable until after the project engineers approved the substitution of Worthington pumps and the purchase order was issued and accepted. Accordingly, we turn to the documents exchanged by the parties to determine the nature of the agreement, if any, reached within them.

In characterizing the various documents exchanged by the parties, we find that plaintiff's purchase order dated August 28, 1974 is appropriately considered an offer to purchase the mixed liquor pumps and related equipment required under item 21 of Contract 3A. Althought the reference to "your quote" in the purchase order is not identified as to date, plaintiff's letter of September 3, 1974 (Joint Ex. 13), which defendant received *before* the August 28 purchase order, supports the plaintiff's position that the August 26 quote was the only intended reference. *Cf. Mead Corp.* v. *McNally-Pittsburgh Mfg. Corp.*, 654 F.2d 1197, 1204 (6th Cir. 1981) (applying Ohio law). The reference to "Plans and Specifications" presumably incorporates the documents which set forth the City's requirements under Contract 3A and Item 21. Plaintiff argues that this reference also reflects its requirement that Worthington assume the same warranty obligation to the City under which Dugan & Meyers was bound. Because this

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[7] Plaintiff contends that the defendant agreed orally to be bound by the general warranty provision to the City contained in the contract Plans and Specifications.

issue is ultimately of no consequence,[8] we will assume that the plaintiff intended its reference to Plans and Specifications to incorporate the general warranty obligation to the City.

Defendant's contention that the three proposal documents dated May 15, May 17 and August 26 together constituted its "offer" to the joint venture cannot be sustained. As plaintiff points out, although both Dugan & Meyers and The Goettle Company were in receipt of the May 15 and May 17 documents, the joint venture never entered into negotiations with Worthington until substantially after the time in which any offer contained therein lapsed. Thus although the parties may have consulted such documents during their August negotiations, they do not have the legal effect of an offer or part thereof absent some express incorporation into the August 26th quotation. Although the same quote number of the May documents was referenced in the August 26 proposal, we do not find this a sufficient basis upon which to conclude that all of the Terms and Conditions contained in the prior documents became part of the offer.

Defendant's reliance on the case of *Mead Corp.* v. *McNally-Pittsburgh Mfg. Corp.*, 654 F.2d 1197 (6th Cir. 1981) is misplaced. In that case, the United States Court of Appeals for the Sixth Circuit held that McNally's proposal for a coal washing plant which included an express limitation on consequential damages was accepted when Mead sent McNally a purchase order for the plant "in accordance with the specifications . . . *and the terms and conditions stipulated in your proposal* W-2394, dated 3/15/73 and revised 11/15/73." (emphasis added). Although the parties had discussed the question of McNally's liability for consequential damages during their negotiations, the Court found that the parties left their negotiations without resolving this question. *Id.* at 1201. When Mead then sent the purchase order expressly incorporating McNally's terms and conditions, the Court held that Mead had accepted the offer as contained in McNally's proposal, including the damage limitation. *Id.* at 1203.

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[8] See footnotes 9, 10, *infra* and accompanying text.

In the case at bar, plaintiff's employee Mr. Kramer testified that during his oral negotiations with Worthington officials in the summer 1974, the question of warranty was discussed and that it was made clear that Worthington's Standard warranty was inadequate. The defendant's August 26 proposal which was then furnished to the plaintiff did not include any express warranties or disclaimer of implied warranties. The absence of the standard terms and conditions included in Worthington's previous proposal is at least some evidence that the Worthington officials dealing with the plaintiff no longer insisted on such terms. Also, plaintiff's letter of September 3 referred exclusively to the August 26 quotation. Unlike in *Mead*, where the purchase order suggested Mead's acquiescence in McNally's terms, the relevant proposal and purchase order in this case support the inference that Worthington agreed to drop any insistence on its standard warranty.

Although a plausible argument can be made that the August 26 proposal alone constituted an offer which plaintiff accepted by its purchase order, defendant's position is in no way enhanced by such characterization. As indicated previously, there was no express incorporation of the terms and conditions of the prior proposal documents into the August 26 document. More important, the August 26 proposal contains no reference whatsoever to an express warranty or a disclaimer of implied warranties. Thus even if the August 26 letter is construed as an offer which was accepted by plaintiff's purchase order, there was no limitation of warranties on the part of defendant included in that offer.

Defendant's Acknowledgment Copy purports to be an acceptance of plaintiff's purchase order. Ohio Revised Code Section 1302.10 (UCC § 2-207), commonly known as the "Battle of the Forms" provision is instructive in this regard. That Section provides:

> § 1302.10 (UCC 2-207) *Additional terms in acceptance or confirmation.*
>
> (A) A definite and seasonable expression of acceptance or a written confirmation which is sent within a rea-

sonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(B) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(1) the offer expressly limits acceptance to the terms of the offer;

(2) they materially alter it; or

(3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(C) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of Chapters 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, and 1309 of the Revised Code.

The notation imprinted on the Acknowledgment Copy brings defendant's acceptance squarely within the proviso to Subsection (A) of § 1302.10. The Acknowledgment Copy contained "additional" or "different" warranty terms[9] than the purchase order and defendant's acceptance was "expressly conditioned upon [plaintiff's] assent to [those] terms and conditions." No valid assent was ever forthcoming.

Defendant's reliance on the imprinted notation statement that "Purchaser shall be conclusively deemed to have accepted the terms of this acknowledgment as the sole terms

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[9] If plaintiff's reference to Plans and Specifications in the purchase order is held to incorporate the general warranty to the City, the warranty terms in the Acknowledgment Copy were "different" from those in the offer. If no incorporation is recognized, then Worthington's warranty provisions were "additional" terms.

of this sale, unless he notifies Worthington to the contrary within 10 days after his receipt of this acknowledgment" is misplaced. There is nothing in the common law or code which suggests that silence or inaction in this context operates as an acceptance of such terms. *Dorton* v. *Collins & Aikman Corp.*, 453 F.2d 1161, 1168, n.4 (6th Cir. 1972) (applying Ohio law). Although the provisions of Subsection (B) are irrelevant if an acceptance is conditioned in the manner set forth in Subsection (A), Ohio Rev. Code § 1302.10, Official Comment 2; *Dorton* v. *Collins & Aikman Corp.*, *supra* at 1168-69, we note that the warranty provisions contained in defendant's Acknowledgment Copy would also be excluded by operation of Subsection (B). Warranty provisions are inevitably construed as terms which materially alter a contract. *See* Ohio Rev. Code § 1302.10, Official Comment 4. Accordingly, a plaintiff's failure to object to additional warranty terms in an acceptance does not render them part of the contract under Subsection (B). It would be anomalous to suggest that a different result should apply under Subsection (A).

Although it might be argued that defendant's Acknowledgment Copy was a counter-offer which plaintiff accepted by its subsequent performance, we reject this approach. To accept this view would give the party who fortuitously fired the "last shot" all of its terms. Most courts and commentators have construed Subsection (C) as the Code's attempt to eliminate this unjustified advantage. See White & Summers, Uniform Commercial Code, § 1-2 at 34. (2d Ed. 1980); *Dorton* v. *Collins & Aikman Corp.*, *supra* at 1169, n.6 (dicta); *Cf. Roto-Lith, Ltd.* v. *F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

Subsection (C) provides that where the conduct of the parties evidences a contract although the parties' documents do not, the law recognizes a contract consisting of the terms on which the parties agree and those supplemented by the Code. In the instant case, the parties' documents disagree on the warranties which govern this sale of goods.[10] Accordingly, the

[10] Even if the purchase order did not incorporate the general warranty to the City and is considered totally silent on the warranty issue, the parties'

implied warranties of merchantability and fitness for a particular purpose contained in Sections 1302.27 (UCC § 2-314) and 1302.28 (UCC § 2-315) apply to this transaction.[11]

In reaching this conclusion, we note that although neither of the parties' documents contained such terms, at least the terms supplied by the Code have the merit of being terms which the Code's draftsmen considered fair. We also take some refuge in the fact that neither party appears to have placed much reliance on the assumption that its particular warranty terms would control the transaction. Defendant's employee, Mr. Robertson testified that although he negotiated with the plaintiff on Worthington's behalf, the Acknowledgment Copies were sent out routinely by others in the company without his participation or review. Plaintiff's witness, Mr. Rayburn testified that the warranty issue was very important to plaintiff and that defendant agreed orally to be bound by the warranty to the City. It is ironic, however, that nothing specific was put in writing regarding this allegedly critical concern. The subsequent exchange of correspondence between plaintiff and defendant regarding defendant's failure to sign the purchase order and defendant's insistence on its own terms and conditions, further convinces the Court that the parties simply failed to agree on this question and hoped it would not become a problem in the future. Viewed in this light, the Court finds that a resort to the Code to furnish the applicable warranties does not interfere unfairly with the legitimate expectations of the parties.

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writings do not "agree" on the question of warranty, since defendant's Acknowledgment Copy was not silent but purported to disclaim implied warranties.

[11] There is no real dispute that Worthington is a "merchant" with respect to the goods sold under Section 1302.27, and that at the time of contracting it had reason to know of the particular purpose for which the goods were required and that plaintiff was relying on its skill and judgment in the selection of suitable goods. Ohio Rev. Code § 1302.28.

B. Breach of Warranty

Having determined that the defendant failed to disclaim implied warranties under the Code, we turn to the more easily resolved question of whether such warranties were in fact breached in the sale of these pump units. The Code sections which define the warranties of merchantability and fitness for a particular purpose provide in pertinent part as follows:

> § 1302.27 (UCC § 2-314):
>
> (A) Unless excluded or modified . . ., a warranty that the goods shall be merchantable is implied in a contract for the sale if the seller is a merchant with respect to goods of that kind . . .
>
> (B) Goods to be merchantable must be at least such as:
>
> (1) Passed without objection in the trade under the contract description; and . . .
>
> (3) Are fit for the ordinary purposes for which such goods are used; and
>
> (4) Run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unit and among all units involved;
>
> § 1302.28 (UCC § 2-315):
> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under § 1302.29 of the revised code an implied warranty that the goods shall be fit for such purpose.

Because the pumps sold in this case were clearly intended and adapted for a particular purpose, we limit our discussion of breach of warranty to the warranty of fitness for a particular purpose. Ohio Rev. Code § 1302.28. There is little question in this case that the pump units as manufactured and installed have proved to be unfit for the pumpage of

sewage at the Little Miami Facility. From the start up of operations, the pumps have experienced repeated failures and a multitude of operational problems. Although a certain period of adjustment wherein minor problems appear and require correction would be expected in a project of this magnitude, the nature and extent of the pump unit failures in this case can only be characterized as extraordinary.

The plaintiff is not required to establish the particular cause of the pump system's failure. It is sufficient that the plaintiff in this case offered evidence that the pump system, the component parts of which were all supplied by the defendant, has failed to perform in the manner intended. *Jetero Construction Co.* v. *South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976). Although defendant attempted to attribute the motor problems in the pump units to the plaintiff's failure to utilize "tie rods" or another form of anchor as a support for the expansion joint, the evidence offered in this respect was insufficient to exculpate the defendant. Worthington introduced certain industry manuals and standards which called for an anchor in addition to the pump casing when an expansion joint is utilized. (Def's. Exs. X, Y). Plaintiff's witnesses testified, however, that although these statements are accurate in a generalized context, the pump casing was a sufficient anchor for the expansion joint in this installation. Defendant did not rebut this testimony. We also note that at no time during installation or at any other time prior to this lawsuit, did defendant apparently raise this concern with the plaintiff. If an additional anchor was clearly warranted, defendant presumably would have brought this to the plaintiff's attention.

In addition to proving that the goods were not fit for the purpose intended, a buyer must satisfy three conditions in order to recover under § 1302.28: (1) that the seller had reason to know of the buyer's particular purpose; (2) that the seller had reason to know that the buyer was relying upon the seller's skill or judgment in furnishing appropriate goods; and (3) that the buyer in fact relied upon the seller's skill or judgment. White & Summers, § 9-9 at 297 (1980). There can be

little dispute in this case that these conditions have been met. The joint venture contracted with Worthington, the manufacturer of the major component pumps, to supply a system which would meet the performance specification of the general contract. Plaintiff relied upon defendant's expertise in selecting the appropriate system and Worthington was aware of that reliance.

We also find that Worhtington was notified of the breach within a reasonable time. The facility began to receive sewage in the summer of 1978. In October of 1978 plaintiff notified defendant of the numerous motor failures within days of their occurrence. This notice was legally adequate.

C. Damages

The measure of damages for breach of warranty is the difference between the value of the goods accepted and the value they would have had as warranted. Ohio Rev. Code § 1302.88(B) (UCC § 2-714). In a case of this sort this difference in value is properly equated with the cost of repair or replacement. *Mead* v. *McNally-Pittsburgh Mfg. Corp.*, 654 F.2d 1197, 1209-10 at n.17 (6th Cir. 1981); *White & Summers*, Uniform Commercial Code § 10-2 at 377 (2d Ed. 1980). Incidental and consequential damages may also be awarded for breach of warranty in a proper case. Ohio Rev. Code § 1302.88(C).

Plaintiff in this case seeks to recover the expenses incurred to date by both itself and the City for repairs to the pump system, the analysis of the system by S.D.R.C., and the anticipated costs of following the recommendations of S.D.R.C. The fact that certain amounts were spent on repairs which ultimately proved unsuccessful does not preclude recovery for such expenditures as consequential damages. *White & Summers, supra* at 379. *See also Curtis* v. *Murphy Elevator Co.*, 407 F.Supp. 940 (E.D. Tenn. 1976) (despite consequential damage limitation buyer awarded cost of unsuccessful repairs). A buyer is also allowed to recover for the estimated costs of future repairs. *White & Summers* § 10-2 at 379 & n.15 (cases cited).

The testimony and evidence offered at trial with respect to the amounts expended to date and the estimated future costs of repair were essentially uncontroverted by the defendant. Having reviewed the testimony and evidence, we find that the amounts for which plaintiff seeks recovery properly fall within the general measure of damages for breach of warranty and permissible consequential damages. Ohio Rev. Code §§ 1302.88 and 1302.89. Although notified of a breach within a reasonable time thereafter, defendant denied liability and declined to participate in efforts to remedy the system. The efforts by the plaintiff and the City to evaluate the system and remedy its defects were undertaken in good faith and were reasonable under the circumstances. Accordingly, plaintiff is entitled to recover as damages for breach of warranty and consequential damages all amounts for which it has sought relief.

IV. Conclusions of Law

(A) This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

(B) Conduct by the parties which recognizes the existence of a contract is sufficient to establish a contract even though the parties documents do not otherwise establish a contract. Ohio Rev. Code § 1302.10(C).

(C) Where the documents exchanged by the parties do not agree on the question of warranty, the Code's implied warranties of merchantability and fitness for a particular purpose will arise in an appropriate transaction. Ohio Rev. Code § 1302.10(C).

(D) Where the seller of a system of pumps and related equipment was aware of the purpose for which the system was intended and that the buyer was relying on its expertise in selecting an appropriate system, an implied warranty of fitness for a particular purpose arises in the sale of such equipment. Ohio Rev. Code § 1302.28.

(E) A pumping system which experiences repeated failures shortly after it is put into operation breaches an implied warranty of fitness for a particular purpose.

(F) A buyer is entitled to recover the difference between the value of the goods accepted and the value they would have had as warranted, as damages for breach of warranty. Ohio Rev. Code § 1302.88(B). The difference in value in this case is determined to be the cost of repairing the system.

(G) Amounts expended for repairs which proved unsuccessful and for an expert analysis of the system are also recoverable as consequential damages.

(H) In accordance with Conclusions of Law F and G, Judgment is hereby entered in favor of the plaintiff in the amount of $424,625.90. Each party shall bear its own costs.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3525

DUGAN & MEYERS CONSTRUCTION COMPANY, INC. AND THE GOETTLE COMPANY,
Plaintiffs-Appellees,

v.

WORTHINGTON PUMP CORPORATION (USA),
Defendant-Appellant.

JUDGMENT

(Filed October 26, 1984)

Before: CONTIE and WELLFORD, Circuit Judges; and COHN, District Judge.

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

It is further ordered that Defendant-Appellant recover from Plaintiffs-Appellees the costs on appeal, as itemized

below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: December 11, 1984

COSTS: Appellant to recover costs)

Filing fee	$ 70.00
Printing	$1,191.09
Total	$1,261.09

APPENDIX D

No. 83-3525

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DUGAN & MEYERS CONSTRUCTION CO., INC.,
AND THE GOETTLE CO.,
Plaintiffs-Appellees,

v.

WORTHINGTON PUMP CORPORATION,
Defendant-Appellant,

CONTINENTAL ELECTRIC CO., INC.,
Third-Party Defendant.

ORDER
(Filed December 10, 1984)

BEFORE: CONTIE and WELLFORD, Circuit Judges and COHN* District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

* Hon. Avern Cohn sitting by designation from the Eastern District of Michigan.

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-80-604

DUGAN & MEYERS CONSTRUCTION CO., INC.
and THE GOETTLE CO., a Joint Venture,
Plaintiff,

vs.

WORTHINGTON PUMP CORPORATION (USA),
Defendant,
Third-Party Plaintiff,

vs.

CONTINENTAL ELECTRIC CO., INC.,
Third-Party Defendant.

PROFFER OF TESTIMONY FOR LARRY RAYBURN

(Served May 10, 1982)

If the witness, Larry Rayburn, had been asked to state the amount of Worthington's proposal and the suppliers of the

elements of its proposal, the witness would have replied that the amount of the proposal was $659,838.00 and covered pumps supplied by Worthington and motors, local control panels and panel automatic controls supplied by Westinghouse through Worthington.

If the witness had been asked whether or not a named manufacturer of the pumps (named in the specifications) was required by the specifications to be listed in Dugan & Meyers' bid, the witness would have replied that "one of the entries [on the bid submitted by Dugan & Meyers] must be a named/manufacturer." (Joint Exhibit 1, pg. S21-1, 21.05 "Bid Evaluation".)

If the witness had been asked to state the names of the manufacturers set forth in the specifications, the witness would have replied that two manufacturers were named in the specifications and that they were Worthington Pumps International and DeLaval Turbine. (Joint Exhibit 1, pg. S21-4, 21.10, Pump Construction, "Manufacturer".)

If the witness had been asked, the witness would have testified that Dugan & Meyers listed only Morris Pumps as a manufacturer of the pump, motor and controls to be provided under Item 21 of the Contract 3A at a price of $563,000.00.

If the witness had been asked, he would have replied that Morris Pumps was not one of the two manufacturers of pumps named in the specifications.

As the witness testified, Dugan & Meyers was the apparent low bidder for Item 3A of the contract which included Item 21.

If the witness had been asked, the witness would have testified that Dugan & Meyers bid utilizing Morris Pump was insufficient for the architects and engineers to make a determination as to whether the Morris Pumps would comply with the detail requirements of the specifications. (Joint Exhibit 16).

If the witness had been asked, the witness would have testified that Dugan & Meyers, while it was the apparent low bidder, would not be awarded Contract 3A unless it furnish equipment manufactured by one of the manufacturers or sup-

pliers named in the specifications (i.e. Worthington or DeLaval) at no increase in the contract price. (Joint Exhibit 1, pg. P-4, "Proposal Major Equipment Offerings".)

If the witness had been asked, the witness would have replied that the other named manufacturer, DeLaval Turbine, could not be named because it had not bid on the local control panels and the panel automatic control system.

If the witness had been asked, the witness would have replied that Dugan & Meyers had the choice of not being awarded the contract or naming Worthington as the supplier of the items under Item 21 at the Worthington proposal price of $659,838.00. Joint Exhibit 1 provided that:

> If the complete information package is not furnished or if it is determined that the equipment or material offered does not meet the requirements of the specifications, or is not equal to that specified, then the Bidder, if awarded the contract, must furnish equipment manufactured by one of the manufacturers or suppliers named in the specifications, at no increase in the contract price. (Joint Exhibit 1, pg. P-4, "Proposal Major Equipment Offerings".)

If the witness had been asked, the witness would have testified that in order to obtain the bid, Dugan & Meyers would have had to absorb an increased cost over the Morris proposal in the amount of approximately $96,000.00.

If the witness had been asked, the witness would have testified that Dugan & Meyers requested Worthington to reduce its bid from $659,838.00 by substituting Continental Electric motors and Autocon panel automatic controls at lower prices than the prices obtained by Worthington for Westinghouse motors and Westinghouse controls.

If the witness had been asked, the witness would have testified that Worthington complied with Dugan & Meyers' request, obtained lower prices from Continental and Autocon, lowered Worthingtons total proposal price from $659,838.00 to $570,251.00 (Joint Exhibit 11).

If the witness had been asked, the witness would have

testified that Dugan & Meyers was allowed to change the pump supplier to make its Contract 3A bid conform to the specifications because Worthington was a named manufacturer of the pumps in the specifications. (Joint Exhibit 16).

If the witness was asked, the witness would have testified that the substitution of Worthington for Morris pumps enabled Dugan & Meyers to obtain the award for Contract 3A; and that the reduction of price achieved by Worthington, at Dugan & Meyers request, resulted in a savings to Dugan & Meyers in the amount of approximately $89,000.00.

Respectfully submitted,

/s/ WILLIAM R. HARDY
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[CERTIFICATE OF SERVICE OMITTED]

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 83-3525

DUGAN & MEYERS CONSTRUCTION CO., INC. and
THE GOETTLE CO., a JOINT VENTURE,
Plaintiff-Appellee,

v.

WORTHINGTON PUMP CORPORATION (USA),
Defendant-Appellant.

AFFIDAVIT OF LARRY P. RAYBURN

(Filed November 9, 1984)

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

Larry P. Rayburn, being first duly sworn, states:

1. I am, and at the time of the trial in this action was, President of The Goettle Co., the co-venturer with Dugan & Meyers Construction Co., Inc. in the Joint Venture which is the Plaintiff-Appellee in the within action.

2. My deposition was never taken in the within action and I never spoke to William R. Hardy, attorney for the Defendant-Appellant Worthington Pump Corporation, prior to trial, during trial (other than on cross-examination), or through the present date. Specifically, I never spoke to Mr. Hardy or any representative of his client about the subject matter of the "Proffer of Testimony for Larry Rayburn" at-

tached hereto as Exhibit A, which was attached to the transcript of the trial of this action.

3. The attached Proffer contains false statements as to what my testimony would be concerning the subject matter contained therein. If asked, I would not have testified as stated in the Proffer, but would have testified as follows:

a. Neither ECI Corporation, the general contractor, nor the Joint Venture was required at any time to name Worthington as the supplier of the equipment under Item 21. The bid of ECI was accepted by the Metropolitan Sewer District (MSD) with Morris listed as the supplier of the Item 21 equipment. MSD at no time indicated that ECI would lose Contract 3A if ECI did not select Worthington.

b. After the bid, the decision was made by Dugan & Meyers Construction and Goettle to form the Joint Venture and perform the mechanical subcontract for the reason that the Joint Venture could perform the work for less than the price of Cebor, a mechanical subcontractor whose proposal was used in compiling ECI's bid. In August of 1974, the decision was made to negotiate with Allis Chalmers and Worthington as possible Item 21 suppliers.

c. The project engineer favored Worthington while MSD was receptive to Allis Chalmers because it was a local manufacturer. Since the Joint Venture would have to demonstrate to the project engineer that Allis Chalmers could provide equipment "equal to that specified" as allowed by the specifications (JT. EX. 1 at P-4), Worthington appeared an easier choice but Worthington's price was too high. Worthington was then told that Allis Chalmers had listed Continental Motors and Autocon Controls and that these were apparently lower priced than the Westinghouse equipment proposed by Worthington.

d. In order to be competitive, Worthington then submitted a lower price proposal which listed Continental Motors and Autocon Controls. Although Worthington was still approximately $20,000 higher than Allis Chalmers in its proposal, the Joint Venture selected Worthington because approval of the project engineer would more easily be achieved.

e. The Joint Venture was not required to accept Worthington's proposal. In fact, ECI had to obtain permission from MSD and the project engineer to substitute Worthington for Morris.

f. The Joint Venture's decision to use Worthington equipment did not save the Joint Venture money, nor did it preserve the contract for ECI. In fact, the selection of Worthington over Allis Chalmers cost the Joint Venture a premium of $20,000.

/s/ LARRY P. RAYBURN

[JURAT OMITTED]